STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Collins, P.J. (not participating) and Murphy and Jansen, J.J.)

TAMARA TAYLOR, LEE ANNE RINTZ,

Plaintiffs-Appellees,

v.

A.H. ROBINS COMPANY, INCORPORATED, WYETH-AYERST LABORATORIES COMPANY and AMERICAN HOME PRODUCTS CORPORATION,

Defendants-Appellants,

and

GATE PHARMACEUTICALS, SMITHKLINE BEECHAM CORPORATION, ZENITH GOLDLINE PHARMACEUTICALS, INC., ABANA PHARMACEUTICALS, INC., RICHWOOD PHARMACEUTICAL COMPANY, INC., ION LABORATORIES, INC., MEDEVA PHARMACEUTICALS, INC., INTERNEURON PHARMACEUTICALS, INC., CAMALL COMPANY, LABORATORIES SERVIER and ALL MICHIGAN PHYSICIANS WHO PRESCRIBED OR GAVE FEN-PHEN AND/OR REDUX TO MICHIGAN PATIENTS,

Defendants.

and

JUDITH H. ROBARDS and KENNETH W. ROBARDS,

Plaintiffs-Appellees,

v.

Supreme Court Docket
No. 120653

Court of Appeals Docket
No. 217269, 217279,
217290 and 217328
(consolidated)

Wayne County Circuit Court
No. 97-731636-NP

Supreme Court Docket
No. 120641

***AMICUS CURIAE* BRIEF OF THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS**

A.H. ROBINS COMPANY, INCORPORATED, WYETH-AYERST LABORATORIES COMPANY and AMERICAN HOME PRODUCTS CORPORATION,

Defendants-Appellants,

and

JOYCE KAFERLE, M.D., and EVELYN ECCLES, M.D., GATE PHARMACEUTICALS, SMITHKLINE BEECHAM CORPORATION, ZENITH GOLDLINE PHARMACEUTICALS, INC., ABANA PHARMACEUTICALS, INC., RICHWOOD PHARMACEUTICALS COMPANY, ION LABORATORIES, INC., MEDEVA PHARMACEUTICALS, INC., PARMED PHARMACEUTICALS, INC., EON LABS MANUFACTURING, INC. and LES LABORATORIES SERVIER,

Defendants.

Court of Appeals Docket No. 227700

Washtenaw County Circuit Court No. 99-5373-MN

AMICUS CURIAE BRIEF OF THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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Date: November 8, 2002

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STATEMENT OF BASIS OF JURISDICTION

For its Statement of the Basis of Jurisdiction, this *amicus curiae*, The Michigan Manufacturers Association, adopts the statements of jurisdiction as set forth in the briefs of Defendants-Appellants.

STATEMENT OF QUESTION PRESENTED

WHETHER THE MICHIGAN LEGISLATURE'S ENACTMENT OF MCL 600.2946(5); MSA 27A.2946(5) -- A PROVISION LIMITING THE LIABILITY OF MANUFACTURERS AND SELLERS OF DRUGS APPROVED BY THE U.S. FOOD AND DRUG ADMINISTRATION -- WAS A PROPER EXERCISE OF ITS LEGISLATIVE POWER?

The Wayne County Circuit Court answered "No."

The Washtenaw County Circuit Court answered "Yes."

The Court of Appeals answered "No."

Plaintiffs-Appellees answer "No."

Defendants-Appellants answer "Yes."

Your *amicus curiae*, The Michigan Manufacturers Association, contends the answer is "Yes."

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Michigan Manufacturers Association ("MMA") is a business organization composed of more than 4,000 private Michigan businesses, organized and existing: (1) to study matters of general interest to its members; (2) to promote their interests, as well as those of all Michigan businesses and the general public, in the proper administration of pertinent laws; and (3) to otherwise promote the general business and economic welfare of the State of Michigan. An important aspect of the MMA's activities is representing the interests of its member-companies in matters of significance before the courts, the U.S. Congress, the Michigan Legislature, and state agencies. The MMA appears before this Court as a representative of private business concerns employing over 90% of the industrial workforce in Michigan -- over one million employees -- many of whom are affected by the issue in the case presently before the Court.

The paramount issue in this case, the constitutionality of MCL 600.2946(5); MSA 27A.2946(5) ("Section 2946(5)") -- which generally provides that the manufacturer or seller of a drug is not liable if that drug was approved for safety and efficacy by the U.S. Food and Drug Administration ("FDA") -- is of particular concern to the MMA and its members. As a principal voice of the manufacturing industry in the State of Michigan, the MMA has a strong interest in ensuring that the body of state law under which the industry functions remains predictable and that court decisions interpreting that law reflect sound legal reasoning -- interests that have been jeopardized by the erroneous decision of the Court of Appeals' panel below in failing to uphold the constitutionality of the statute in question, and more specifically, by mistakenly finding that the statute improperly delegated to the FDA the legislative function of determining what is a cause of action.

In 1995, the Michigan Legislature passed a comprehensive tort reform package in response to "an explosion of product liability litigation, resulting in unfair and excessive judgments against manufacturers and sellers, bankruptcies, reduced capacity of firms to compete internationally, curtailed innovation, reduced funding for research, higher consumer costs, and unaffordable or unavailable casualty insurance." (Senate Fiscal Bill Agency Bill Analysis, S.B. 344, p. 1, August 28, 1995, attached as Appendix A). The reform package was aimed at bringing "some common sense, reasonableness, and predictability to the liability system, especially to product liability." (House Legislative Analysis Section, Senate Bill 344, p. 8, June 8, 1995, attached as Appendix B).

Included within the 1995 tort reform package was a defense for manufacturers and sellers of FDA approved drugs. The defense was intended to ensure the availability of beneficial, and in some instances, life-saving, drugs: "Drug companies spend large sums of money and expend enormous energy getting approval for their products. Many valuable products never reach the market or are withdrawn because of successful lawsuits (or the threat of future lawsuits) even though there is no medical evidence that they are harmful." (House Legislative Analysis Section, Senate Bill 344, pp. 9-10, June 8, 1995, attached as Appendix B).

The MMA seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Because of its experience in matters of this sort, the MMA is well-situated to brief the Court on the concerns and the significance of this case to the business community. The MMA believes that it is in the best interests of the members it represents, the entire business community, and the business and economic welfare of the State of Michigan, that this Court reverse the decision of the Court of Appeals and uphold the constitutionality of Section 2946(5).

STATEMENT OF FACTS AND PROCEEDINGS

Your *amicus curiae*, The Michigan Manufacturers Association, adopts the statement of facts and proceedings set forth in the briefs of Defendants-Appellants. The facts pertinent to the issue discussed in this brief are summarized below.

Procedural History

Plaintiffs, on behalf of themselves and all others similarly situated, have alleged personal injury from the use of the prescription drugs fenfluramine, phentermine, and dexfenfluramine, which all are FDA approved prescription drugs.[1] Defendants sought dismissal of the complaints on the basis of Section 2946(5), which provides that, with certain limited exceptions, a manufacturer or seller of a drug is not liable in a products liability action if the drug was approved by the FDA and both the drug and its labeling were in compliance with FDA approval at the time the drug left the manufacturer's or seller's control.

It is uncontested that the FDA approved the challenged drugs and their labeling before those drugs left the control of any Defendant, and Plaintiffs admitted that the drugs at issue were labeled in compliance with FDA requirements and that they had not pled any of the statutory exceptions to Section 2946(5). Plaintiffs instead asserted that Section 2946(5) was unconstitutional on several grounds: that it is an impermissible delegation of judicial and legislative authority; that it improperly denies access to the courts; and that it violates equal protection and due process guarantees. Of these challenges, only one is at issue.

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[1] Two separate, but nearly identical, lawsuits against Defendants-Appellants drug manufacturers and distributors were filed by Plaintiffs Tamara Taylor and Lee Anne Ritz in Wayne County Circuit Court and by Judith and Kenneth Robards in Washtenaw Circuit Court. Wayne County Circuit Judge Marianne Battani ruled Section 2946(5) unconstitutional, while Washtenaw County Circuit Judge David Swartz upheld the statute's constitutionality. Both matters were appealed and consolidated.

The Statute at Issue

Section 2946(5) was adopted by the Michigan Legislature in 1995 in conjunction with a comprehensive reform of Michigan's tort laws. Section 2946(5) provides in pertinent part:

> In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller. . . .[2]

With certain limited exceptions not applicable here,[3] the statute generally limits the liability of a manufacturer or seller of a drug in a products liability action if the drug was approved by the FDA and the drug and its labeling were in compliance with FDA approval at the time the drug left the manufacturer's or seller's control.

The Court of Appeals Decision

In its November 30, 2001 Opinion, the Michigan Court of Appeals, while recognizing it was presented with a "close question," ruled that Section 2946(5) works an unconstitutional delegation of legislative authority.[4] Specifically, the Court of Appeals held that Section 2946(5) violates Const 1963, Art 4, §1, which states: "The legislative power of the State of Michigan is

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[2] More than once, Plaintiffs suggest Section 2946(5) is inflexible and fails to account for the withdrawal of prior FDA approval (see, e.g., Plaintiffs' brief, p. 27). Such a suggestion is without merit as Section 2946(5) does not apply to a drug sold after the effective date of an FDA order to remove the drug from the market or one withdrawing FDA approval.

[3] The two exceptions to Section 2946(5) are: (1) fraud (withholding from or misrepresenting information concerning the drug); and (2) bribery (making an illegal payment to an official or employee of the FDA for the purpose of securing approval of the drug). Again, Plaintiffs conceded the exceptions are not applicable here.

[4] Jeffrey Collins, P.J., did not participate.

vested in a senate and a house of representatives." Legislative power, as the court noted, generally refers to the authority to make, alter, amend and repeal laws. Although Michigan's constitution does not explicitly provide that legislative power cannot be delegated, a nondelegation doctrine has been applied through judicial interpretation. (November 30, 2001 Court of Appeals Opinion, p. 7).

Relying on *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951) and *Colony Town Club v Michigan Unemployment Compensation Comm*, 301 Mich 107; 3 NW2d 28 (1942), the Michigan Court of Appeals first asserted that delegations to foreign agencies or private entities violate the constitution because the Michigan Legislature retains no oversight and is unable to guide the exercise of its delegated power through the establishment of standards. (November 30, 2001 Court of Appeals Opinion, p. 9).

Relying primarily on *Radecki v Director of Bureau of Worker's Disability Compensation*, 208 Mich App 19; 526 NW2d 611 (1994), the Court of Appeals' panel alternatively contended that even if delegations to foreign agencies are permissible, the Michigan Legislature can incorporate by reference only those standards that evolve by action of the Michigan Legislature. (November 30, 2001 Court of Appeals Opinion, p. 10).

The Court of Appeals' panel then held Section 2946(5) unconstitutional in that "it places the FDA in the position of final arbiter with respect to whether a particular drug may form the basis of a product liability action." (November 30, 2001 Court of Appeals Opinion, p. 10). The panel reasoned that the State of Michigan retains no oversight of the FDA and, due to the nature of science and the FDA's approval and withdrawal processes, an ever-evolving list of drugs will be excluded from product liability actions. (*Id.*). In closing, the Court of Appeals' panel acknowledged Defendants' argument that a fact or event having significance independent of a

legislative act can be incorporated by reference into a statute without running afoul of the nondelegation doctrine. While noting this argument was "almost convincing," the panel determined that the standards adopted must be established and essentially unchanging, and FDA approval did not so qualify.

STANDARD OF REVIEW

Constitutional issues are questions of law and are reviewed *de novo* on appeal. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999). Also relevant to the present appeal is the well-established rule that a statute is presumed to be constitutional unless its constitutionality is clearly apparent. *Id.* at 24.

SUMMARY OF ARGUMENT

Your *amicus curiae* often has appeared in cases before this Court asking the Court to restore, insofar as feasible, certainty and predictability into difficult areas of the law. In stark contrast, the instant appeal involves an area where your *amicus curiae* thought the law had been settled so that there was certainty and predictability.

This Court already has been presented with excellent briefs containing compelling arguments by the various Defendants and *amicus curiae* the Product Liability Advisory Council on the adequacy and sufficiency of the FDA's approval process for drugs,[5] as well as the Court of Appeals' misplaced reliance on *Coffman v State Bd of Examiners in Optometry, Colony Town Club v Michigan Unemployment Compensation Comm*; and *Radecki v Director of Bureau of*

[5] Despite stating that the wisdom of the Act is not at issue, Plaintiffs spend nearly eight pages addressing the "overview of the FDA process." Such a discussion serves no purpose in light of the issue as framed by Plaintiffs other than to prejudice the Court with inflammatory and highly selective reports.

Worker's Disability Compensation.[6] Those arguments seem incontrovertible and will not be repeated in this brief.

What your *amicus curiae* does contend in this brief is that the adoption of an independently significant external standard, such as exists in the case of a regulatory compliance defense like Section 2946(5), does not constitute an improper delegation of legislature power. Michigan's tort reform package was enacted by the Michigan Legislature to curtail excessive and unjustifiable jury verdicts, the inevitable consequences of which are escalating consumer product prices, unaffordable insurance, the unavailability of beneficial and even life-saving drugs, and the threatened economic viability of businesses throughout the State of Michigan.

To successfully challenge a statute on constitutional grounds, a plaintiff must overcome a heavy presumption in favor of the statute's constitutionality. The judiciary must avoid substituting its own judgment and beliefs for that of the legislature's reasoned and fully informed public policy determinations. Here, Plaintiffs have not, and cannot, overcome their heavy burden. The Michigan Legislature's limitation of liability of drug manufacturers and sellers in the circumstance of FDA approved drugs is an action indisputably within the Legislature's authority and power.

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[6] As argued in those briefs, the referenced case law either is inapposite or actually supports a finding that Section 2946(5) is constitutional.

ARGUMENT

SECTION 2946(5) LIMITING THE LIABILITY OF MANUFACTURERS AND SELLERS OF DRUGS APPROVED BY THE U.S. FOOD AND DRUG ADMINISTRATION IS A PROPER EXERCISE OF LEGISLATIVE POWER BY THE MICHIGAN LEGISLATURE

The MMA has urged for years that regulatory compliance be deemed a defense in tort actions. The practical reality of the absence of the regulatory compliance defense is that the MMA's members are left without any discernable standard by which they can conduct their business and avoid liability and the MMA submits that such a result would be detrimental not only to its members but to the best interests of the State of Michigan and its economic welfare. Legal commentators have long contended that compliance with regulatory requirements imposed by an administrative agency should preclude tort liability. For example, Richard C. Ausness argues that "a regulatory compliance defense must fully protect manufacturers from liability when their products meet applicable federal design, testing, or labeling requirements. It must also provide immunity to manufacturers whose products have satisfied federal requirements for pre-market licensing or approval." Ausness, "The Case For A 'Strong' Regulatory Compliance Defense," 55 Md L Rev 1210, 1253 (1996).

The MMA recognizes that courts have been reluctant to view adherence to an industry practice as more than a factor in assessing due care. This hesitation stems primarily from the concern that the industry would be setting its own standard. As the Michigan Supreme Court stated in *Marietta v Cliffs Ridge, Inc*, 385 Mich 364, 369-370; 189 NW2d 208 (1971):

> The customary usage and practice of the industry is relevant evidence to be used in determining whether or not this standard [of due care] has been met. Such usage cannot, however, be determinative of the standard.

Governmental regulations, conversely, are not established by industry practice. Prior to enactment, agencies generally conduct lengthy public hearings, consider the testimony of numerous experts, and evaluate large quantities of research data. Government experts draft specific regulations with the sole purpose of providing companies with guidance as to how to conduct their activities safely and companies rely upon those governmental regulations. Many products put into the stream of commerce by manufacturers and sellers could not be sold unless they were in compliance with applicable federal or state statutes and the regulations and codes promulgated pursuant to such statutes. As Justice Griffin cautioned in his dissent in *Schultz v Consumers Power Co*, 443 Mich 445, 472-473; 506 NW2d 175 (1993), to impose liability where a company had complied with all applicable code requirements "eviscerates the certainty and legislative judgment codified in the state and federal safety codes."

The MMA submits that the Michigan Legislature, in enacting Section 2946(5), made the decision not to eviscerate the certainty and legislative and administrative judgment represented by FDA approval of the prescription pharmaceuticals involved in this case. MMA urges this Court to support that legislative determination.

A. The Presumption of Constitutionality

In considering the constitutionality of a statute, the established rule of statutory construction as stated in *Sullivan v Michigan State Board of Dentistry*, 268 Mich 427, 429-430; 256 NW 471 (1934), must be recognized:

> Even if the law could be construed in two ways, one consistent with the constitutionality, and the other inconsistent therewith, the former will be considered as the one presumptively intended by the legislature. [citations omitted].

A statute is presumed constitutional absent a clear showing to the contrary. *McDougall v Schanz, supra.* at 24. The court in *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 723; 575 NW2d 68 (1997), quoting from *Council of Orgs & Others for Educ About Parochiaid, Inc v Governor*, 455 Mich 557; 566 NW2d 208 (1997), explained the constitutional deference to be afforded statutes:

> The power to declare a law unconstitutional should be exercised with extreme caution and never where a serious doubt exists with regard to the conflict. . . . "Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity."

A statute must, if at all possible, be viewed in the light that will sustain its validity:

> The party challenging the facial constitutionality of an act "must establish that no set of circumstances exists under which the act would be valid. The fact that the . . . act might operate unconstitutionally under some conceivable set of circumstances is insufficient. . . ." If any state of facts reasonably can be conceived that would sustain [a legislative act], the existence of the state of facts at the time the law was enacted must be assumed."

Council of Orgs & Others for Educ About Parochiaid, Inc v Governor, supra. at 568 (citations omitted). Even Plaintiffs acknowledge that it is "very rare" to hold a statute unconstitutional (Plaintiffs' brief, p. 1).

The presumption of constitutionality is based upon a recognition that Government works best when there is mutual respect and cooperation between the legislature and the judiciary. Nowhere is such benefit more pronounced than in the tort liability arena. Court decisions striking down statutory tort reform efforts completely ignore the fact that the legislature has certain tools, often unavailable to the courts, that make the legislature best situated to reach fully informed decisions regarding the need for public policy changes in the law. For example,

legislatures, not courts, hold public hearings during which a wide range of information is disseminated to educate and assist the determination of whether a law should be changed, and if so, how. Conversely, little to no public hearings are held in a courtroom to assist the judges in reaching public policy determinations. Consequently, trial judges should defer to the careful analysis of the legislature that is incorporated into each piece of legislation enacted.

In the present matter, the Court of Appeals' panel properly noted the strong presumption of constitutionality:

> The general standards applicable to claims that a statute is facially unconstitutional are well established:
>
> > Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. The party asserting the constitutional challenge has the burden of proving the law's invalidity. A party challenging the facial constitutionality of a statute must establish that no circumstances exist under which it would be valid.

(November 30, 2001 Court of Appeals Opinion, pp. 6-7). Despite recognizing the presumption, the Court of Appeals inexplicably failed to afford Section 2946(5) the mandated presumption to which it was entitled. It is that strong presumption that the Court of Appeals improperly ignored in reaching its determination that Section 2946(5) constituted an unlawful delegation to the FDA of the legislative function to determine what is a cause of action.

B. The Michigan Legislature's Adoption of Independently Significant Determinations of the FDA does not Constitute an Impermissible Delegation of Legislative Authority

The Michigan Legislature has the authority to change, modify, or abolish existing common law rights of action. *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980). Article 3, §7 of the Michigan Constitution (1963) states that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force *until they*

expire by their own limitations, or *are changed, amended or repealed.*" (Emphasis added.) In upholding the constitutionality of Michigan's No-Fault Act, which limited certain tort causes of action for personal injuries arising from motor vehicle accidents, this Court quoted the United States Supreme Court in *Silver v Silver*, 280 US 117, 122 (1929), which flatly declared that the constitution does not prohibit legislative changes in the law:

> [T]he constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.

Shavers v Attorney General, 402 Mich 554, 612, fn. 36; 267 NW2d 72 (1978).

By enacting Section 2946(5), the Legislature limited a cause of action. Plaintiffs do not dispute the Michigan Legislature's ability to modify or even abolish a cause of action ("The legislature has many ways in which it can ease the burden upon drug manufacturers, including the granting of out-and-out immunity to them, unconditioned upon anything." Plaintiffs' brief, p. 26). Nevertheless, Plaintiffs argue that the Legislature may not adopt FDA approval as the benchmark for which drugs warrant immunity. Plaintiffs' distinction is difficult to discern and cannot withstand judicial scrutiny. Despite Plaintiffs' alarmist rhetoric, the enactment of Section 2946(5) does not require or allow the FDA to perform any legislative function whatsoever. The Legislature, not the FDA, determined what is, and what is not, a viable cause of action against manufacturers and sellers of certain drugs. The Legislature itself made law conditioned on independently significant determinations of the FDA that does not constitute an impermissible delegation to the FDA of the authority to make law. As a matter of policy, the Michigan Legislature has determined to limit certain common law personal injury actions against drug manufacturers and sellers in certain circumstances, which is a determination the Legislature is constitutionally empowered to make.

The FDA has comprehensive regulatory authority over drug formulation, production, testing and labeling and is the sole decision-maker concerning the safety of drugs marketed in the United States. The Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301-397 (1997), authorizes the FDA to regulate development, production, testing and labeling of drugs. New prescription drugs must be licensed by the FDA before they can be marketed. Prior to licensing, experts review all of the data and determine whether the drug is safe and effective for its intended purpose. In light of this comprehensive review process, the FDA is better equipped than a lay person to determine whether a drug is safe and beneficial:

> Finally, it seems plain that the FDA, with its expertise, can reach more accurate decisions than can a common law jury. Even the most vociferous critics of a regulatory compliance defense do not argue otherwise.

Green, "Statutory Compliance And Tort Liability: Examining The Strongest Case," 30 U Mich J L Ref 461, 477 (1997).[7]

Section 2946(5) does not delegate legislative authority to the FDA as that office already has the authority to regulate drugs. Thus, Section 2946(5) is not a delegation of legislative power but rather, an incorporation by reference of the federal law into the state law. Surely, the reasoned view in dealing with products such as prescription drugs that are properly subject to extensive federal regulation, is that the Michigan Legislature may properly incorporate the rulings of the FDA as they are duly promulgated from time to time.[8]

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[7] Green particularly notes that when the FDA approves a new drug, it is not providing safety minimums but rather, when the FDA does approve a drug, it is because the drug's efficacy sufficiently outweighs its risks and therefore it should be available for patients with appropriate warnings. *Id.* at 474.

[8] The MMA refers to the well-reasoned dissent of Justice Brennan in *Miller v Dep't of Treasury*, 385 Mich 296; 188 NW2d 795 (1971) at pp. 308-328 for an excellent discussion on the proposition that a statute which prospectively recognizes future actions to existing federal

Clearly, the Michigan Legislature has the right to pass a law whose operation might depend upon, or be affected by, a future contingency. Here, the Legislature exercised its own judgment on the question of limiting the liability of drug manufacturers and sellers where the FDA has approved the drug(s) at issue. The statute before the Court came from the hands of the Michigan Legislature as a complete law having at once a binding force of its own and dependent upon no additional consent or action for its vitality and existence. The contingency involved in the statute was not delegated to any other tribunal but settled by the Legislature itself. It determined, as a proper and expedient conclusion, that manufacturers and sellers of drugs that have been approved by the FDA should not be liable. That was the whole question involved and that question the Legislature determined for itself as its sole responsibility. Nothing was left to discretion. The statute fixes the question by reference to an independent extrinsic fact. Simply because that extrinsic fact involves the FDA, it does not follow that the legislative discretion of such body is in any manner substituted for its own. As the New York court long ago stated in *People v Fire Ass'n of Philadelphia*, 92 NY 311, 317 (1883):

> Neither the law nor its expediency depended upon the legislation of another State. It remained the law and its expediency was the same, whether the other States legislated or not. If they did, the contingency arose which the law stood ready to meet; if they did not, it remained nonetheless the law, although no fact occurred to set it in operation.

To forbid the Legislature to incorporate the expertise of the FDA by a single enactment would be tantamount to restricting the exercise of that proper legislative discretion that is exclusively vested in that body. What would be certainly constitutional if done seriatim, by several and separate acts, does not become unconstitutional when the same precise and identical

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legislation incorporated by reference in the statute does not constitute an unconstitutional delegation of legislative power.

result, founded upon exactly the same legislative discretion, is accomplished by one. To rule otherwise, would be to make a grave constitutional question turn upon the bare form instead of the substance of legislative action. *Miller v Dep't of Treasury*, *supra.* at 321 (dissenting opinion). Such a result would effectively hinder good government and such a result would be injurious to the economic health and welfare of the State of Michigan.

The Michigan Legislature determined that approval by the FDA is better than case-by-case product liability litigation. The MMA suggests that this is not only a proper exercise of legislative power, but also a practical one. The prestigious American Law Institute published a study concluding some form of regulatory compliance defense should be recognized in tort litigation:

> We are satisfied that some form of regulatory compliance defense should be recognized in tort litigation. There is a persuasive case for making regulatory compliance a complete bar to tort liability once certain carefully defined conditions have been satisfied respecting the regulation.[9]

The Michigan solution is that pharmaceuticals present a strong case for tort deference to regulatory standards and expertise because the FDA is so well-equipped to evaluate the risks and benefits of new drugs. The Michigan Legislature incorporated by reference the determinations of an agency with the technical expertise to make the necessary factual evaluation. MMA submits that such a legislative determination is at the heart of lawmaking.

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[9] The American Law Institute, Enterprise Responsibility For Personal Injury, Reporters' Study, Vol. II, p. 110.

CONCLUSION AND RELIEF REQUESTED

In enacting Section 2946(5), the Michigan Legislature determined the community as a whole is better served by limiting the liability of manufacturers and sellers of FDA approved drugs. By enacting this defense, the Legislature did not impermissibly delegate its law-making duties. To the contrary, the Legislature exercised and fulfilled its responsibilities and duties.

Plaintiffs would improperly have this Honorable Court declare Section 2946(5) unconstitutional on erroneous allegations of an unconstitutional delegation of legislative authority. Plaintiffs request this Court to declare the duly enacted law of this State to be unconstitutional and to enjoin its application and enforcement. The Court of Appeals impermissibly accepted Plaintiffs' misdirected challenge and engaged in "judicial nullification," which has been described as a process employed by a minority of courts to overturn tort reform efforts under the guise of a constitutional infirmity and despite clear and sound public policy reasons for the reform. See Schwartz, Behrens and Lorber, 27 Wm Mitchell L Rev 237, "Tort Reform Past, Present and Future: Solving Old Problems and Dealing with 'New Style' Litigation" (2000). Plaintiffs' arguments more appropriately should be made to the Michigan Legislature, not the courts. This Court should not further countenance the improper rulings below.

For all of the above reasons and the reasons presented to the Court by Defendants and other concerned parties on appeal, your *amicus curiae*, The Michigan Manufacturers Association, respectfully requests that this Court declare Section 2946(5) to be constitutional.

Respectfully submitted,

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Senate Bill 344 (Substitute S-4 as passed by the Senate)
Sponsor: Senator Joel D. Gougeon
Committee: Economic Development, International Trade and Regulatory Affairs

Date Completed: 8-28-95

RATIONALE

The term "product liability" refers to the body of law that governs the liability of manufacturers and sellers of products that are alleged to have caused personal injury or property damage. According to many, over the past several decades there has been an explosion of product liability litigation, resulting in unfair and excessive judgments against manufacturers and sellers, bankruptcies, reduced capacity of firms to compete internationally, curtailed innovation, reduced funding for research, higher consumer costs, and unaffordable or unavailable casualty insurance. These circumstances have led to considerable debate at both the Federal and state levels, which escalated in the mid-1980s and continues in the present. This debate has been fueled, in part, by various highly publicized cases, including those involving flammable baby pajamas, asbestos, the Dalkon Shield, exploding gas tanks, and silicone breast implants. In Congress and state legislatures, a number of proposals have been advanced to reduce manufacturers' and sellers' exposure to liability.

Among the most common recommendations are those that would establish a defense if a product met government standards; if a product were misused or modified by the consumer; if the harm were caused by an inherent characteristic of a product (one that cannot be removed if the product is to serve its function); or if a consumer exposed himself or herself to a known risk. Many also believe that a wholesaler or retailer should not be held liable unless the seller's negligence caused the injury; that the amount awarded for noneconomic damages (e.g., pain and suffering) should be limited; and that a product liability defendant should not have to pay more than its share of the total damages.

In addition, many advocate changes that would affect not just product liability cases but all civil suits involving death, personal injury, or property damage. Among other things, these recommendations would create a defense if the injured party were intoxicated; restrict the use of expert testimony; and limit attorneys' contingent fees. Other suggestions involve the allocation of fault among the parties: Under current Michigan law (except in product liability cases and cases in which the plaintiff is not at fault), the court must determine each party's percentage of total fault and award damages accordingly. If one party's share is uncollectible, however, the court must reallocate that amount among the other parties. Also, the court cannot consider the liability of someone who has entered into a settlement.

While product liability and tort revision continue to be debated at the Federal level, individual states have enacted many of the measures described above. According to the American Tort Reform Association, states enacting reforms in 1995 include Colorado, Hawaii, Illinois, Indiana, Montana, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin. Many believe that Michigan, too, should take steps to limit the exposure of product manufacturers and sellers, reduce damages awards, and encourage early settlements.

CONTENT

The bill would amend the Revised Judicature Act (RJA) to do the following in regard to product liability actions:

- **Provide that a manufacturer or seller would not be liable if a practical and technically feasible alternative production practice were not available, or if the product were tested by a government agency and found to be in compliance with standards in Federal or state statute and regulations.**
- **Create a presumption that a manufacturer or seller was not liable if the aspect of production that allegedly caused the injury complied with Federal or state standards.**
- **Allow the admission in evidence, for certain purposes, of subsequent changes in theory, knowledge, technique, or procedure.**
- **Provide that a manufacturer or seller would not be liable if the harm were caused by alteration or misuse of the product that was not reasonably foreseeable; if the user were aware of, and voluntarily exposed himself or herself to the risk; or if the alleged harm were caused by an inherent characteristic of the product.**
- **Specify that a manufacturer or seller would not be liable for failure to warn if the product were provided for use by a sophisticated user.**
- **Specify that a defendant would not be liable for failure to warn of risks that should have been obvious to a reasonably prudent product user or that were a matter of common knowledge.**
- **Limit damages for noneconomic loss.**
- **Eliminate joint and several liability.**
- **Redefine "product liability action" to include injuries or death resulting from the sale of a product.**

The bill would do the following in regard to all tort actions:

- **Establish criteria for expert witnesses.**
- **Provide that a novel form of scientific evidence could be admitted only if it had achieved general scientific acceptance among experts in the field.**
- **Provide that it would be an absolute defense if the person who was injured or killed had an impaired ability to function due to the influence of intoxicating alcohol or a controlled substance and were 50% or more the cause of the accident or event; and require a reduction of damages if the percentage were under 50%.**
- **Require a court to include the fault of someone who had entered into a settlement, and someone who could have been named as a party, when determining the percentage of fault in a personal injury claim involving multiple tort-feasors.**
- **Delete provisions requiring a court to allocate an uncollectible amount among other parties to an action.**
- **Specify a client's right to compensate an attorney on an hourly, fixed, or contingent fee basis; restrict compensation for an attorney on a contingent fee who failed to file a demand for compensation with the allegedly liable party; specify procedures for a response and settlement offer from the allegedly liable party to a demand for compensation; and prohibit or restrict the use of contingent fee arrangements if the claimant had received a preretention or postretention offer.**

In addition, the bill would limit malpractice actions against certified public accountants.

The bill would apply to actions filed after 90 days following the bill's effective date.

Product Liability Amendments

Venue. The bill provides that, for purposes of the RJA section governing venue in tort actions, in a product liability action, a defendant would be considered to conduct business in a county in which the defendant's product was sold at retail. ("Venue" refers to the particular county in which an action may be tried. The RJA generally provides that a tort action may be tried in the county in which all or part of the cause of action arose and in which either 1) the defendant resides, has a place of business, or conducts business, or 2) the registered office of a corporate defendant is

located. The Act further specifies the proper county if these criteria are not met.)

"Product Liability Action". Currently, the RJA defines "products liability action" as an action based on a legal or equitable theory of liability brought for or on account of death or injury to a person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product. The bill, instead, refers to death or injury caused by the "production" of a product or product component. The bill would define "production" as the activities described above, as well as "selling".

Compliance with Nongovernmental Standards. Under the RJA, it is admissible as evidence in a product liability action that the manufacture, construction, design, etc. was done pursuant to the generally recognized and prevailing nongovernmental standards in existence at the time the product was sold or delivered by the defendant to the initial purchaser or user. The bill provides, instead, that a court would have to admit as evidence in a product liability action that production of the product was in accordance with the generally recognized and prevailing nongovernmental standards in existence at the time the specific unit of the product was sold or delivered by the defendant to the initial purchaser or user.

Production Practices. The bill specifies that in a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller would not be liable unless the plaintiff established that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at that time, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. An alternative production practice would be practical and feasible only if the technical, medical, and scientific knowledge relating to the production of the product were, at the time the specific unit of the product left the control of the manufacturer or seller, developed, available, and capable of use in the production of the product, and economically feasible for use by the manufacturer. Technical, medical, or scientific knowledge would not be economically feasible for use by the manufacturer if use of that knowledge in production of the product would significantly compromise the product's usefulness or desirability.

Governmental Standards. Currently, it is admissible as evidence that the manufacture, construction, design, etc. was done pursuant to the Federal and state law, rules, or regulations in effect at the time the product was sold or delivered by the defendant to the initial purchaser or user. The bill would delete this provision.

Under the bill, a manufacturer or seller would not be liable for failure to produce a reasonably safe product if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the product that allegedly caused the injury was, under the oversight of a Federal or state agency, tested and found to be in compliance with standards set forth in Federal or state statutes and standards, rules, and regulations promulgated by Federal and state agencies responsible for reviewing the safety of the product that were relevant to the defect alleged to have caused the injury.

In addition, a presumption would arise that the manufacturer or seller was not liable for failure to produce a reasonably safe product if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the production that allegedly caused the injury was in compliance with standards set forth in Federal or state statutes and standards, rules, and regulations promulgated by Federal and state agencies responsible for reviewing the safety of the product that were relevant to the defect alleged to have caused the injury. A presumption could be rebutted only by clear and convincing evidence proving that, regardless of the compliance, the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller.

Lack of testing or a finding of compliance or noncompliance with a standard, rule, or regulation would not raise a presumption of negligence on

the part of a manufacturer or seller. Evidence of compliance or noncompliance with a standard, rule, or regulation not relevant to the event causing the death or injury would not be admissible.

Evidence of Subsequent Changes. Currently, evidence of a change in the philosophy, theory, knowledge, technique, or procedures of or regarding the manufacture, construction, design, etc. made, learned, placed in use, or discontinued after the death or injury is not admissible in a product liability action. The bill provides, instead, that with regard to the production of a product that was the subject of a product liability action, evidence of a philosophy, theory, knowledge, technique, or procedure that was learned, placed in use, or discontinued after the event resulting in the death of or injury to the person or property, that if learned, placed in use, or discontinued before the event would have made the event less likely to occur, would be admissible only for the purpose of proving the feasibility of precautions, if controverted, or impeachment.

Nonliability for Altered or Misused Product. Under the RJA, it is admissible in a product liability action that the cause of the death or injury was an alteration or modification of the product, or its application or use, made by a person other than, and without specific directions from, the defendant. The bill would delete this provision, and specify instead that a manufacturer or seller would not be liable in a product liability action for harm caused by an alteration or misuse of the product unless the alteration or misuse were reasonably foreseeable. Whether there had been an alteration or misuse of the product and whether an alteration or misuse was reasonably foreseeable would be legal issues to be resolved by the court.

"Alteration" would mean a material change in a product after the product left the control of the manufacturer or seller and would include a change in the product's design, packaging, or labeling; a change to or removal of a safety feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product. "Misuse" would mean use of a product in a materially different manner than the product's intended use. Misuse would include uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

Assumption of Risk. A manufacturer or seller would not be liable in a product liability action if the purchaser or user were aware that use of the product created a risk of personal injury and voluntarily exposed himself or herself to that risk. This provision would not relieve a manufacturer or seller from a duty to use reasonable care in a product's production.

Inherent Characteristic. A manufacturer or seller would not be liable if the alleged harm were caused by an inherent characteristic of the product that could not be eliminated without substantially compromising the product's usefulness or desirability and that was recognized by a person with the ordinary knowledge common to the community.

Seller's Defense. In a product liability action, a seller other than a manufacturer would not be liable for harm allegedly caused by the product unless either of the following applied: 1) the seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries; or 2) the seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Product Warnings. Currently, it is admissible as evidence that, before the death or injury, there were provided written warnings that gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product that the defendant knew or should have known.

The bill would add that a defendant would not be liable for failure to warn of a material risk that was or should be obvious to a reasonably prudent

product user or a material risk that was or should be a matter of common knowledge to persons in the same or similar position as the plaintiff.

In a product liability action brought against a manufacturer or seller for harm allegedly caused by a failure to provide adequate warnings or instructions, the manufacturer or seller would not be liable unless the plaintiff proved that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information that was reasonably available at the time the specific unit of the product left the control of the manufacturer.

The bill provides that the preceding provisions would not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product had left the manufacturer's or seller's control.

Except to the extent a state or Federal statute or regulation required a manufacturer to warn, a manufacturer or seller would not be liable in a product liability action for failure to provide an adequate warning if the product were provided for use by a sophisticated user. "Sophisticated user" would mean a person or entity that, by virtue of training, experience, a profession, or legal obligations, was or generally was expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect.

Damages for Noneconomic Loss. In a product liability action, damages for noneconomic loss could not be awarded in an amount that exceeded $280,000. If the defect in the product caused either the person's death or permanent loss of a vital bodily function, however, the maximum award for noneconomic losses would be $500,000. The State Treasurer would have to adjust the maximum amounts at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. In awarding damages in a product liability action, the trier of fact would have to itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party could inform the jury of the maximum limits on the awards. The court would have to adjust an award of noneconomic loss to conform to the statutory maximums.

The limitation on damages for noneconomic loss for death or permanent loss of a vital bodily function would not apply to a defendant if the trier of fact determined by clear and convincing evidence that the death or loss was the result of the defendant's gross negligence. "Gross negligence" would mean conduct so reckless as to demonstrate a substantial lack of concern for whether injury resulted.

"Noneconomic loss" would mean any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages. "Economic loss" would mean objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

Expert Witnesses/Scientific Evidence

The bill specifies that in an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert would not be admissible unless the court determined that the opinion was reliable and would assist the trier of fact. In making that determination, the court would have to examine the opinion and the basis for it, including the facts, technique, methodology, and reasoning relied on by the expert, and would have to consider all of the following:

- Whether the opinion and its basis had been subjected to scientific testing and replication, and peer review publication.
- The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis were consistent with those standards.
- The known or potential error rate of the opinion and its basis.
- The degree to which the opinion and its basis were generally accepted within the relevant expert community.
- Whether the basis for the opinion was reliable and whether experts in that field would rely on the same basis to reach the

type of opinion being proffered.
- Whether the opinion or methodology was relied on by experts outside the context of litigation.

A novel methodology or form of scientific evidence could be admitted as evidence only if its proponent established that it had achieved general scientific acceptance among impartial and disinterested experts in the field.

In an action alleging medical malpractice, these provisions would be in addition to, and would not otherwise affect, the criteria for expert testimony specified in the RJA for medical malpractice cases.

Impairment Defense

In an action for the death of an individual or for injury to a person or property, it would be an absolute defense that the individual upon whose death or injury the action was based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual were less than 50% the cause of the accident or event, an award of damages would have to be reduced by that percentage. "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" would mean that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses were impaired to the point that his or her ability to react was diminished from what it would have been had the individual not consumed liquor or a controlled substance. An individual would be presumed to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed in the Michigan Vehicle Code for driving under the influence of intoxicating liquor or a controlled substance, a presumption would arise that the individual's ability to operate a vehicle was impaired.

Allocation of Fault

The RJA currently specifies that in a personal injury action involving fault of more than one party to the action, including third party defendants, the court generally has to instruct the jury to answer special interrogatories or, if there is no jury, make findings indicating the total amount of each plaintiff's damages, and the percentage of the total fault of all of the parties regarding each claim as to each plaintiff, defendant, and third party defendant. The bill would change this requirement to specify that in an action for the death of or injury to an individual, regardless of the theory of liability, the court would have to instruct the jury to answer special interrogatories, or in the absence of a jury, determine the total amount of each plaintiff's damages, and the percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under Section 2925d of the RJA, regardless of whether the person was or could have been named as a party to the action. For the purpose of this provision, a court could determine that a person and that person's employee were to be considered a single person.

(Under the Michigan Court Rules, a third-party defendant is someone who is or may be liable to the defendant for all or part of the plaintiff's claim, and is served with a summons and complaint by a defending party. Under Section 2925d of the RJA, when a release or a covenant not to sue is given to someone liable in tort, it discharges that tort-feasor from liability for contribution to any other tort-feasor.)

The RJA also requires the court to determine the award of damages to each claimant in accordance with the findings required above, subject to any reduction under Section 2925d or 6303, and enter judgment against each party. (This requirement, however, does not apply to product liability actions or actions in which the plaintiff is not at fault.) The court may not enter judgment against a person who has been released from liability under Section 2925d. (Section 6303 requires the court in a personal injury action to reduce a judgment by the amount of the plaintiff's expense or loss that has been paid by a collateral source, e.g., insurance benefits.) The bill would delete the exception for product liability actions and actions in which the plaintiff is not at fault.

The Act also requires the court to determine whether any part of a party's share of an obligation is uncollectible from that party and reallocate any uncollectible amount among the other parties

according to their respective percentages of fault. Except for reallocated amounts, a person cannot be required to pay damages in an amount greater than his or her percentage of fault. The bill would delete the requirement that the court reallocate uncollectible amounts. Under the bill, in actions involving multiple tort-feasors, liability would be separate, and a person could not be required to pay damages that exceeded his or her percentage of fault. If an action included a medical malpractice claim against a person or entity described in Section 5838a(1), one of the following would apply:

-- If the plaintiff were determined to have no fault, the liability of each defendant would be joint and several, regardless of whether the defendant were a person or entity described in Section 5838a(1).
-- If the plaintiff were determined to have fault, upon motion made not later than six months after a final judgment was entered, the court would have to determine whether all or part of a party's share of the obligation was uncollectible from that party, and would have to reallocate any uncollectible amount among the other parties, whether or not another party was a person or entity described in Section 5838a(1), according to their respective percentages of fault. A party would not be required to pay a percentage of any uncollectible amount that exceeded his or her percentage of fault. The party whose liability was reallocated would continue to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(Section 5838a(1) refers to actions against a licensed health care professional, a licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment.) The bill would retain a current provision under which a governmental agency, other than a governmental hospital or medical care facility, is not required to pay a percentage of an uncollectible amount that exceeds the governmental agency's percentage of fault.

"Fault" would include an act, omission, conduct, breach of warranty, or breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that was a proximate cause of damage sustained by a party.

In addition, the Act specifies that, in a medical malpractice action, the court must reduce to the appropriate limit any damages award that exceeds the prescribed maximum amount. This provision, however, does not apply to a product liability action, or to an action in which a plaintiff is not at fault. The bill would delete these exceptions.

Venue

The bill would amend the RJA's venue provisions to refer to the county in which "the injury occurred", rather than the county in which "all or part of the cause of action arose". The bill also would delete the requirement that venue be changed only to the county in which the moving party resides, when venue is changed based on hardship or inconvenience.

Certified Public Accountants

In an action for professional malpractice against a certified public accountant (CPA), the CPA would be liable for civil damages resulting from an act, omission, decision, or other conduct in connection with public accounting services performed by him or her only if the act, omission, decision, or conduct constituted fraud or an intentional misrepresentation or if the CPA were aware that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. If the CPA identified in writing to the client each person who was intended by the CPA to rely on the services and sent a copy of the writing or similar written statement to each person identified in the writing or written statement, the CPA and his or her employees, partners, members, officers, or shareholders could be held liable only to each identified person, in addition to each person who was a party to a contract with the CPA.

Attorney Fees/Settlement Offers

The following provisions would apply to an action filed against a person in this State based upon a cause of action including, but not limited to, negligence, strict or product liability, breach of implied warranty, or professional malpractice, in which damages were sought for personal injury, property damage, wrongful death, or economic or noneconomic loss. These provisions would not

apply to a contingent fee agreement in which neither a preretention nor a postretention offer was made within the specified time requirements. Further, the provisions would not apply to an agreement between a claimant and an attorney to retain the attorney either on an hourly rate basis or fixed fee solely to evaluate a preretention offer, or to collect overdue amounts from an accepted preretention or postretention offer.

The bill specifies that a claimant who retained an attorney could elect to compensate the attorney's services in connection with the claim on an hourly, fixed, or contingent fee basis. Further, at the initial meeting, the attorney would have to disclose to the claimant the claimant's right to elect the method of compensation. "Claimant" would mean an individual who, on his or her own behalf or vicariously, was seeking compensation for tortious physical or mental injury, property damage, or economic loss. "Contingent fee" would mean a fee negotiated in a contingent fee agreement that was payable only from the proceeds of a recovery on behalf of a claimant. "Fixed fee" would mean a fee negotiated in an agreement between an attorney and a claimant under which the attorney agreed to perform a specific legal task in exchange for a specific sum to be paid by the claimant. "Hourly fee" would mean a fee paid by a claimant to an attorney that was determined by multiplying an hourly rate, agreed to by the attorney and the claimant, by the number of hours that the attorney worked on behalf of the claimant in furtherance of the claimant's interest.

At any time after retention, an attorney charging a contingent fee would have to send, on behalf of the claimant, a demand for compensation by certified mail to the allegedly liable party or that party's attorney. "Allegedly liable party" would mean a person, an insurer of the person, or another individual or entity alleged by a claimant to be liable for a portion of the damages alleged by the claimant. The demand for compensation would have to include at least the factual basis of the claim, the legal theory on which it was based, and the names and, if known, addresses and telephone numbers of each person involved in the incident on which the claim was based, including witnesses.

A claimant's attorney would have to provide by certified mail a copy of each demand for compensation to the claimant and to each allegedly liable party or the party's attorney at the time the attorney sent the demand for compensation. If reproduction costs were significant relative to the size of the demand for compensation, the claimant's attorney could offer other forms of access to the materials convenient and at reasonable cost to an allegedly liable party's attorney. An attorney charging a contingent fee who failed to file a demand for compensation could not collect a fee greater than 10% of a settlement or judgment received by the attorney's claimant after reasonable expenses were deducted.

An allegedly liable party would have 60 days after the date of the receipt of a demand for compensation to issue a response by certified mail stating a settlement offer to the claimant. The party and his or her attorney would have to include in the response copies of materials in their possession concerning the claim upon which the allegedly liable party relied in making the settlement offer, except for material that the party believed in good faith was not discoverable by the claimant during the course of litigation. If reproduction costs were significant relative to the size of the settlement offer, the allegedly liable party's attorney could offer other forms of access to the materials convenient and at reasonable cost to the claimant's attorney. The response would have to state whether it would expire within 30 days, whether it could be accepted for a longer definite period, or whether it could be accepted until notice of withdrawal. Even if a response provided for an expiration of less than 30 days, a claimant could accept the response within 30 days.

An allegedly liable party could increase a settlement offer in a response during the 60-day period by sending an additional response. If an additional response were sent, the time for acceptance would be 10 days after the date of receipt of the additional response by the claimant's attorney or 30 days after the date of the receipt of the initial response, whichever was later, unless the additional response specified a longer period for acceptance.

An attorney retained after a claimant received a preretention offer could not enter into an agreement with the claimant for a contingent fee based upon or payable from the proceeds of a preretention offer that remained in effect.

"Preretention offer" would mean an offer to settle a claim for compensation for damages made to a claimant not represented by an attorney at the time of the offer.

An attorney who was retained after a claimant received a preretention offer that the claimant did not accept, and who later received a postretention offer that the claimant accepted, could not enter into an agreement with the claimant for a contingent fee based upon or payable from the proceeds of that postretention offer that exceeded 20% of the excess of the postretention offer minus the preretention offer, after the deduction of reasonable expenses. "Postretention offer" would mean an offer in response to a demand for compensation made to a claimant who was represented by an attorney at the time of the offer, which was made within the time constraints of and conformed to these provisions.

The retained attorney of a claimant who did not receive a preretention offer and who received a postretention offer that the claimant accepted could not enter into an agreement with the claimant for a contingent fee in excess of 10% of the first $100,000 plus 5% of the amount above $100,000 of the accepted postretention offer, after the deduction of reasonable expenses.

If an allegedly liable party's postretention offer were rejected, but a later settlement offer were accepted, or if there were a judgment in favor of the claimant, the claimant, irrespective of a preretention offer, would not be obligated to pay a retained attorney a fee greater than the sum of the following:

-- The amount of the fee that would have been calculated had the postretention offer been accepted, but only as applied to the subsequent settlement offer or judgment up to the amount of the postretention offer.
-- The product of multiplying the contingent fee percentage by the amount by which the subsequent settlement or judgment exceeded the postretention offer, after the deduction of reasonable expenses.

MCL 600.919 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would do a great deal to address the excesses of tort law, especially in the product liability field. According to an article in *Business Week*, "Each year, over $100 billion flows through the liability system from companies to lawyers and claimants" (7-29-91). In addition to paying the direct costs of lawsuits, damages awards, and insurance premiums, businesses and the economy incur incalculable costs when products cannot be developed or marketed due to potential litigation. Small business and innovation are especially hard-hit within this internationally competitive environment, particularly when a firm is forced to choose between not marketing a product and risking bankruptcy because insurance is not available. Consumers, too, suffer when they are denied new products that would increase public safety or improve their quality of life, or when existing products are discontinued, prices are raised, and jobs are lost. Unfortunately, manufacturers often are considered impersonal, rich, and even greedy, which makes them an easy target for product liability claims. As a result, product liability litigation not only has threatened the financial viability of many enterprises, but also has added substantially to the cost and unavailability of many goods and services. The bill would reverse this trend by significantly limiting manufacturers' and sellers' exposure to liability and encouraging early settlements.

Response: According to a more recent article in *Business Week*, "...the National Association of Insurance Commissioners puts the [annual product liability cost] figure at about $4 billion, which includes all insurance premiums, legal fees, and damages collected" (3-20-95). Furthermore, many of the nationwide complaints regarding product liability litigation stem from the award of punitive damages and the imposition of strict liability against manufacturers and sellers, which focuses on the product itself rather than on the conduct or state of mind of the defendant. Michigan, however, does not recognize strict liability; in this State, any product liability defendant may raise every available defense. Also, punitive damages cannot be awarded in Michigan.

Supporting Argument

It is unfair to deem a product defective when it conforms to applicable government standards, especially if the product has been tested under the

oversight of a Federal or state agency. These standards are promulgated after intense public scrutiny, expert evaluation, and thorough product evaluation. Lay jurors should not be permitted to second-guess a standard that has been developed by government experts. Under the bill, a manufacturer or seller could not be held liable if a product, under governmental oversight, were tested and found to be in compliance with Federal or state standards. If a product complied with government standards but had not been tested by a Federal or state agency, there would be a presumption--rebuttable only by clear and convincing evidence--that the manufacturer or seller was not liable. In addition, lack of testing or a finding of compliance or noncompliance with a standard would not raise a presumption of negligence.

Supporting Argument

The bill would firmly establish what is known as the state-of-the-art defense, which reportedly is the generally prevailing rule among states. This concept gives manufacturers and sellers a defense when they have used the most advanced technology available. Under the bill, a manufacturer or seller would not be liable for an alleged production defect unless the plaintiff established that, according to generally accepted production practices at the time the product left the defendant's control, a practical and technically feasible alternative design was available and would have prevented the harm without impairing the usefulness or desirability of the product.

In addition, manufacturers and sellers would not be liable for a defectless product--that is, for an inherent aspect of a product that cannot be removed if the product is to serve its function and that is commonly recognized (such as the blade of a knife). In effect, this would recognize that an ordinary consumer is the best judge of whether the dangers he or she perceives are outweighed by the benefits of the product. Along the same lines, the bill would recognize that warnings or instructions about obvious dangers are unnecessary, by providing that a defendant would not be liable for failure to warn of material risks that were or should be obvious or a matter of common knowledge. In addition, a manufacturer or seller would not be liable for failure to warn if a product were provided for use by a sophisticated user.

The bill also would exempt a manufacturer or seller from liability if a consumer voluntarily exposed himself or herself to a known risk. Further, a manufacturer or seller would not be liable for failure to warn unless the plaintiff proved that the manufacturer knew or should have known about the risk based on the information available at the time the product left the manufacturer's control. This would ensure that defendants were not held responsible for hazards that they could not or should not have known about before a product left their control. In addition, by precluding liability for harm caused by an unforeseeable misuse or alteration of a product, the bill would recognize that the manufacturer or seller should not have to bear responsibility for injury attributable to the consumer or others.

Supporting Argument

The bill would establish a fault-based standard of liability for nonmanufacturing product sellers, by providing that a seller would not be liable unless it failed to exercise reasonable care or a product failed to conform to an express warranty, and the failure was a proximate cause of the harm. By holding sellers responsible only for their own wrongdoing, the bill would eliminate unnecessary and burdensome legal costs and insurance premiums. Since manufacturers ultimately indemnify sellers for the harm caused by the manufacturers' own products, claims should be brought directly against them. In addition, placing liability on the party that is in the best position to prevent harm would encourage product safety.

Supporting Argument

A cap on awards for noneconomic losses, such as pain and suffering, in product liability cases would reduce the incidence of unrealistic jury awards while still protecting the right of an injured party to recover the full amount of economic damages, such as medical expenses and lost wages. There is a common belief that noneconomic damages are a significant source of overly generous and arbitrary payments. This is because these claims cannot be easily translated into monetary amounts and, as a result, arriving at an award for noneconomic losses can be a very subjective and emotional process for the jury. By capping noneconomic damages in product liability cases, the bill would continue the reform started by Public Act 178 of 1986, which placed a similar cap on noneconomic damages in medical malpractice cases.

Response: Capping noneconomic damages would reflect a distrust in the jury system, which represents the cornerstone of this nation's system of justice. It is the same jurors, now being blamed for excessive awards, who would be responsible for making the difficult allocation of fault among product liability defendants.

Supporting Argument

The bill would move toward the full elimination of joint and several liability begun by Public Act 178 of 1986. Under the traditional concept of joint and several liability, a single defendant may be responsible for paying the entire amount of the damages, even if there are other tort-feasors who contributed to the injury. Since the Revised Judicature Act was amended by Public Act 178, the jury or the judge must determine the percentage of fault of all of the parties to an action, and the court must enter judgment accordingly; that requirement, however, does not apply to a product liability action or to a case in which the plaintiff is without fault. As a result, in cases in which the injured party is also at fault, it is in his or her interest to bring a product liability suit. Also, in cases involving a workplace injury--for which the employer is immune from tort liability under workers' compensation law--it is to the plaintiff's advantage to bring a product liability suit against a manufacturer who can be held liable for the full amount of the damages. The bill would make several changes to address this situation. First, the bill would eliminate joint and several liability in product liability cases, so each defendant would be responsible for only its percentage of the fault. Also, for purposes of allocating fault in any personal injury action involving more than one party at fault, a court could determine that a person and that person's employee were to be considered a single person. In addition, a court would have to consider the percentage of fault of a tort-feasor who was released from liability. Furthermore, the bill would eliminate the requirement that a court reallocate uncollectible amounts. As a result of these amendments, the recovery from any party in any personal injury action (except a medical malpractice case) could not exceed that party's percentage of the total fault, and the incentive to bring product liability suits would be reduced.

Supporting Argument

Under current law, a plaintiff may still recover damages even though he or she was largely responsible for an accident due to alcohol or drug use. Many people consider this highly unfair to defendants, and believe that this sort of lawsuit is an abuse of the civil justice system. The bill would create an absolute defense in a personal injury or wrongful death action if the individual who was killed or injured were at least 50% at fault as a result of intoxication or drug use. If an individual were less than 50% at fault, the damages would have to be reduced by his or her percentage of fault.

Supporting Argument

The bill's early-offer provisions would encourage the early resolution of any lawsuit involving personal injury, wrongful death, property damage, or economic or noneconomic loss. Under the bill, an attorney charging a contingent fee would have to send a demand for compensation to the other party; an attorney who failed to do so could not collect a contingent fee over 10% of the settlement or judgment. An attorney's contingent fee essentially would be based on a percentage of the difference between a settlement offer and the plaintiff's ultimate recovery. These provisions are designed to limit the amount of a contingent fee to that portion of a case to which the attorney added value--that is, to the portion of an award that was achieved by the attorney's work and undertaking of a risk. The bill not only would spare both sides the costs of prolonged litigation, but would ensure that injured parties received a greater portion of their recovery at an earlier date.

Supporting Argument

Apparently, certified public accountants sometimes are subject to suits based on information contained in their reports brought by people other than their clients. Under the bill, a malpractice claim against a certified public accountant could be brought only by the CPA's clients or someone whom the CPA intended to rely on his or her services.

Opposing Argument

There is no product liability crisis in Michigan. In response to concerns about product liability and its impact on the economy, in June 1988 then-Governor Blanchard appointed a Special Counselor on Product Liability, Lawrence C. Mann, to review product liability laws, pending legal cases, and a survey of thousands of Michigan businesses. Mr. Mann's report was issued in June 1989, and concluded, "The tort system and substantive rules governing liability for defective

products are not in crisis." Anecdotal reports of individual firms' being unable to market a product due to the lack of insurance, and allegations of companies' being forced to close because of exorbitant damages awards, do not amount to evidence of a crisis. Moreover, any unaffordability or unavailability of insurance does not translate into a need to reform the tort system; rather, it reflects the nature of the insurance business and its investment practices, and the need to regulate that industry. Most of the recommendations in the 1989 report, in fact, pertained to amending the insurance law and gathering data.

Furthermore, there is little reason to believe that amending Michigan's tort law would affect insurance rates, the cost of doing business in Michigan, or this State's economy. As the 1989 report stated, "In this national and global context, the impact on one state's product liability laws has little if any impact upon its 'business climate'...; and, "A substantial majority of cases filed against Michigan businesses were filed in states other than Michigan". This State's substantive law will rarely be applied to a suit brought against a Michigan manufacturer or seller by someone who is injured in another state. Also, according to the Alliance of American Insurers, product liability rates are an exception to the usual practice of setting rates by state; instead, they are based on countrywide experience.

The 1989 report also stated, "Many of the proposed reforms...would have the effect of radically altering the deterrence and compensatory functions of the products liability segment of our tort law... [O]ur civil justice system, although not perfect, has produced substantial benefits, including the production of safer products and the distribution of much needed funds as compensation to the victims of product related accidents." Like the proposals made in the 1980s, this bill would severely erode the accountability of business for selling and promoting dangerous products.

Opposing Argument

The bill is unnecessary in view of earlier tort reforms and judicial decisions. Among other things, Public Act 178 of 1986 dramatically altered the doctrine of joint and several liability (which had allowed a plaintiff to recover an entire verdict from any defendant who was collectible) as well as the collateral source rule (which held that funds received by an injured party from insurance policies and other third party sources could not be set off against a judgment holding a tort-feasor liable for money damages). Public Act 178 also altered the prior rules governing venue for tort cases; requires pretrial mediation in all cases in which alleged damages exceed $10,000; and requires courts to award costs and fees in the case of a frivolous suit or defense. According to the 1989 Mann report, "The available information indicates that several of the reforms adopted in 1986 have substantially reduced the exposure of defendants in tort, personal injury litigation in general and products liability cases in particular." Concerning venue, "The new statute clearly balances venue in favor of the county in which the defendant resides, conducts business or has a place of business."

In addition, the report states, "The pronouncements of the Michigan Supreme Court...have substantially narrowed the theories of recovery available to personal injury claimants and substantially reduced the potential dollar liability of defendants." A judicial trend in favor of defendants also was described in a February 1990 UCLA Law Review article: "...[B]y the early to mid-1980s, the authors claim, courts were not only refusing to extend doctrine to benefit plaintiffs, but in many cases, they were also effectively retreating from prior pro-plaintiff stances" (*Lawyers Monthly*, March 1990).

Opposing Argument

The proposed defense for compliance with government standards would have the effect of abolishing many, if not most, injured parties' right to bring suit against product manufacturers and sellers. Under current Michigan law, compliance with government standards already may be considered strong--but not conclusive--evidence that the defendant was not negligent. This rule is fair to both sides because it allows jurors and judges to look at all of the circumstances and decide whether a product was reasonably safe. Under the bill, however, if a product were tested by a government agency and met its standards, the defense would be *absolute*, which means that the plaintiff could not even attempt to overcome it. If a product met government standards but had not been tested by a Federal or state agency, there would be a presumption, rebuttable only by clear and convincing evidence, that the product was safe. These provisions would create an enormous

loophole through which product manufacturers could escape liability for dangerous products, while injured victims would be left uncompensated and without any form of redress.

The bill assumes that government standards constitute a reasonable level of safety, which is rarely the case. Government standards are the product of lobbying and compromise; they may be woefully inadequate in the first place or simply out-of-date. In fact, many government standards by statutory definition are *minimum* standards. According to testimony by a Georgetown University Law Center professor, standards set by the National Traffic Highway Safety Administration are an example of statutory minimum standards, and the Food and Drug Administration has consistently taken the position that its regulatory actions should have no bearing on lawsuits for compensation. In the workplace, Occupational Safety and Health Administration standards are most frequently applied; these standards may change soon after they are promulgated, however, if they are unsafe. Moreover, the same manufacturers that want this shield against liability are making every effort to undercut Federal regulations and get Congress to reduce the funding of regulatory agencies responsible for enforcing the standards.

According to the 1989 Mann report, "...the current approach to government standards and federal and state law is fair and reasonable in light of the diverse laws and regulatory schemes which bear upon products liability. Providing those laws and regulations with a presumptive effect in products litigation would negatively effect [sic] the level of consumer protection to which we have become accustomed." Once manufacturers and sellers had complied with the applicable standards, they would have little incentive to take the necessary steps to ensure that their products actually were safe in the real world.

Finally, the bill refers to compliance with standards set forth in Federal "and state" statutes and standards; it makes no distinction between Michigan standards and standards set by a state other than Michigan.

Opposing Argument

One of the positive aspects of product liability litigation is its deterrent effect. A manufacturer will increase product safety in order to avoid legal liability, or will alter a product in order to remedy an area that has been subject to litigation. In making these decisions, a manufacturer most frequently will employ a cost-benefit analysis: Will the cost of the increased safety be less than or equal to the potential liability costs? By capping noneconomic damages awards and eliminating joint and several liability, however, the bill would give manufacturers less incentive on a cost-benefit basis to make safe products.

As the 1989 report points out, the doctrine of joint and several liability is based substantially upon risk allocation and risk-spreading, and presumes that product manufacturers and sellers are in a different position than the individual victim. "The accident victim in today's mass market, technological world will frequently have misperceptions regarding the actual risks posed by various products. More significantly, the plaintiff has no resource subsequent to a disabling injury to recoup his or her loss or restore himself to a pre-accident condition. Under the proposed reform, the victim and his family have to absorb, the majority of the loss reflected in the uncollectible portion of the verdict. That absorption will necessarily mean resort to the public welfare and social programs supported by tax dollars." In addition to being unfair to the victim, eliminating joint and several liability would be unnecessary. According to the report, joint and several liability does not appear to pose substantial problems for Michigan manufacturers, and payouts directly attributable to joint and several liability are marginal.

Moreover, this amendment would be particularly harmful in combination with the proposed defense for compliance with government standards. According to Senate committee testimony, there is almost no serious product liability case in which the defendant could not claim that the product was approved by the government. If the government were found to be responsible, then, the victim could be left with little or no recovery. The same result could occur in the event of a workplace injury, since employers are exempt from liability under workers' compensation law. An employer actually could have the majority of the fault (by ordering a worker to use defective machinery, for example), but would remain uncollectible.

The bill also would diminish a victim's ability to recover, by requiring juries and judges to allocate

fault to nonparties. As a spokesperson for the Michigan Trial Lawyers Association (MTLA) pointed out, these could include uninsured individuals, parties who had settled with the plaintiff, a plaintiff's co-workers, and bankrupt corporations. By accusing a nonparty of wrongdoing and having a jury assign a share of the fault to the "empty chair", manufacturers could reduce their own liability.

Response: The rule of joint and several liability was developed in the context of contributory negligence, which prevented a plaintiff who was negligent in any degree from recovering unless the defendant had committed gross negligence. Since the Michigan Supreme Court in 1979 replaced that system with the doctrine of comparative negligence, a plaintiff's own negligence no longer bars recovery, but his or her damages are reduced to the extent of his or her negligence. Since a plaintiff who is not entirely innocent still may recover, it is not fair to burden a defendant with responsibility for full payment of damages when the defendant may be only minimally responsible for the loss.

Opposing Argument

By setting limits on the amount of noneconomic damages plaintiffs could be awarded, the bill would single out the most severely injured victims to afford relief to blameworthy manufacturers and their insurers. The burden on these victims would be no less real by virtue of the fact that only "noneconomic" injury would not be fully compensated. Noneconomic injuries include not only pain and suffering and loss of enjoyment, but also grief, anxiety, shock, indignity, humiliation, and terror. Also, it would be inappropriate and unfair to judge all cases of noneconomic damages by the same measure; for example, the pain and suffering that result from injury to or even loss of a limb cannot be compared with that which result from being rendered a quadriplegic for the remainder of one's life. Finally, it would be dishonest to allow a jury to award whatever amount it deemed proper in the belief that its verdict would be given effect, and then require the award to be reduced to the statutory cap.

Opposing Argument

It would be patently unfair to create an absolute defense to liability if a product were altered or misused, except if the alteration or misuse were reasonably foreseeable. Under the bill's definition of "alteration", even a change in a product's label would immunize the manufacturer from liability. According to the MTLA, for example, if a manufacturer placed on its machine a warning label that it knew would wear off before the product's useful life had expired, the manufacturer still would be immune. Or, a manufacturer would be immune if it attached a safety device with flimsy screws that the consumer attempted to replace. In addition, a manufacturer would have little incentive to use certain safety features, such as childproof caps or closures on drugs or poison; if a manufacturer provided a warning to keep the product out of reach of children and a parent inadvertently left the product within a child's reach, there would be no liability because of the parent's "misuse". Further, the defense for misuse would apply if *anyone* with knowledge about a product gave a warning or instruction concerning its use. This would be particularly onerous in the context of the workplace; if a supervisor gave a worker instructions that a worker forgot to follow, the manufacturer would be immune even if that misuse were predictable. Under current law, a manufacturer may introduce evidence that its product was altered, and a jury may reduce a plaintiff's damages by the percentage of his or her negligence.

Opposing Argument

The bill would immunize manufacturers and sellers from liability if a consumer voluntarily exposed himself or herself to a known risk. Every day, people use products that they know might result in an injury--for example, by driving or riding in a car. As the MTLA pointed out, if a manufacturer provided a defective fuel tank that leaked gasoline in a collision and severely burned a passenger, the manufacturer would not be liable because everyone using an automobile is aware that there is a risk of injury in the event of an accident. The bill fails to distinguish between situations in which people are generally aware of potential injury, and circumstances under which someone is aware of a particular defect that is likely to cause injury and uses the product anyway. Under current law, a plaintiff's knowledge of a risk associated with the use of a product already is admissible in evidence, and a plaintiff's award may be reduced if the jury finds that he or she acted unreasonably in using a product despite its risk.

Opposing Argument

Under the bill, a manufacturer or seller would not be liable for failure to warn if a product were

provided to someone who, by training, experience, or profession, was generally expected to know about the product. This would be true even if the defendant knew that the buyer was not the person who would ultimately use the product, that the ultimate user was not knowledgeable about its dangers, and that the buyer would not warn the user of the dangers. This provision is unnecessary and overbroad, since Michigan law already recognizes a sophisticated user defense and applies it fairly. Under this defense, a product supplier is relieved of liability for failure to warn the ultimate user if it demonstrates that the supplier could reasonably rely on the intermediaries between itself and the ultimate user to warn of product-related dangers (*Tasca* v *GTE Products Corp.*, 175 Mich App 617 (1988)). The focus under this analysis is not just on whether the purchaser was a sophisticated user, but also on whether the defendant acted reasonably in relying on the purchaser to warn ultimate users of the product's dangers. The bill, in contrast, would create blanket immunity whenever a sophisticated user purchased a product.

In addition, the proposed defense could be particularly harmful in the workplace. Since the definition of "sophisticated user" would include someone who, by virtue of "legal obligations", was expected to know about a product's hazards, this could apply to any employer subject to the workplace safety requirements of the Federal or Michigan Occupational Safety and Health Act.

Opposing Argument

The bill provides that a defendant would not be liable for failure to warn of a material risk that "is or should be" obvious. By including the term "should", the bill is saying that if a person didn't discover a risk in the exercise of reasonable care, he or she would be totally barred from recovery. This would considerably expand the common law rule, under which there is no liability for failure to warn of a material risk that *is* obvious, because a warning would be superfluous. Under current Michigan law, if a plaintiff carelessly fails to discover a defect, the jury may apportion the liability--but the plaintiff is not automatically denied recovery.

The bill also provides that a manufacturer or seller would not be liable for failure to warn unless the plaintiff proved that the manufacturer knew or should have known about the risk of harm based on information available at the time the product left the manufacturer's control. This would excuse manufacturers from liability for failure to warn of subsequently discovered defects. For example, a drug company might not know that a product is dangerous at the time of sale, but years later discovers that the product has harmful side effects. If the manufacturer failed at that point to warn consumers, it could be criminally prosecuted by the Food and Drug Administration--but would be protected from civil liability under the bill. This would eliminate the current rule, recently affirmed by the Michigan Supreme Court, that manufacturers have a postmanufacture duty to warn of a defect that existed at the point of manufacture, but for some reason was undiscoverable by the manufacturer and the consumer at that time (*Gregory* v *Cincinnati Inc.*, No. 98284, 8-15-95). Under the language of the bill, according to the MTLA, the only time a manufacturer would have a duty to warn would be at the point of manufacture.

Furthermore, although some plaintiffs could bring a product liability action based on a theory of liability other than failure to warn (such as breach of warranty or negligent manufacture), in many cases the only applicable theory of liability is failure to warn. This is particularly true in cases involving a product with an inherent characteristic that cannot be removed without compromising the product. Although the product is not defective, it may present a danger to some consumers. For example, a typically safe drug might have serious side effects for a few patients; in this case, an unsuspecting consumer is entitled to a warning about potential hazards.

Opposing Argument

By providing an absolute defense for harm caused by an inherent characteristic that could not be eliminated without compromising a product and that was commonly recognized, the bill could eliminate the common law cause of action for negligent entrustment. For example, if a retailer knowingly sold a gun to a 12-year-old, who used the weapon to injure or kill someone, the victim would have no recourse against the retailer. This result would occur because the bill would define "product liability" with reference to "production", and would include "selling" in the definition of "production".

Opposing Argument

The proposed impairment defense is unnecessary in light of Michigan's comparative negligence rule, and would unfairly allocate risks associated with defective products. An example of this point is given in the 1989 Mann report: Assume that a motor vehicle has a dangerously defective fuel system, and the nature of the defect involves a lack of integrity during low-impact, rear-end collisions. Also assume that a driver has a blood alcohol level above .07% (the level at which someone is presumed impaired for purposes of operating a motor vehicle); the driver loses control of the vehicle, which spins and hits a tree. Although the risks typically associated with this type of collision are bruises and abrasions, the fire initiated by this impact consumes the vehicle and the driver. In this scenario, the risk created by the vehicle's defective fuel system was not known to the driver and was not attributable to any conduct of the driver. Under the bill, however, the driver's estate would recover nothing. The current approach allows the jury to weigh the consequence of a plaintiff's fault and balance it against the degree to which the defendant caused an accident or aggravated an injury.

Furthermore, the proposed defense is unnecessary since a court already may deny a plaintiff any recovery if a plaintiff must rely on his or her own wrongful conduct to establish a cause of action. This common law rule was recently reiterated by the Michigan Supreme Court (*Orzel* v *Scott Drug Company*, No. 98506, 8-15-95).

Opposing Argument

By raising the standard of proof in product liability cases from a preponderance of the evidence to clear and convincing evidence, the bill would set an unreasonably high threshold and make it very difficult for many injured parties to have their day in court.

Opposing Argument

The bill would create an almost insurmountable hurdle for the qualification of any expert witness who was not employed by or supporting a manufacturer. As the MTLA pointed out, every industry has far more employees who can qualify as "experts" than are available to the plaintiff. Further, requiring a court to consider whether a witness's opinion was "generally accepted" means that the opinion of a scientific outcast (such as Galileo) who was later proven to be correct would not be admissible. Current Michigan Rules of Evidence establish the foundation for admitting expert opinion evidence: "If a court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" (MRE 702). Michigan courts already may find that some individuals are not qualified as "experts" and that the information upon which they base their opinion is not sufficient. Furthermore, a party may attempt to "impeach", or discredit, any witness of the opposing party upon cross-examination.

Opposing Argument

Under the bill, a court could not admit a "novel methodology or form of scientific evidence" unless its proponent established that it had "achieved general scientific acceptance among impartial and disinterested experts in the field". While this might appear, at first, to codify the current *Davis-Frye* test, the bill actually would be far more sweeping. The *Davis-Frye* test is Michigan's standard for determining the admissibility of expert scientific testimony, and is designed to ensure that a jury does not rely on unproven and ultimately unsound scientific methods or techniques of determining a fact. The test allows the admission of expert testimony concerning a novel scientific technique only if that technique has achieved recognition among impartial and disinterested experts in the field. The difference between this test and the bill is that *Davis-Frye* governs the admission of evidence of scientific methods and techniques, while the bill refers to all types of "scientific evidence". Cases in which the *Davis-Frye* test is applied generally involve testimony concerning a method of scientific measurement, such as a polygraph machine or serological electrophoresis, where the judge must first determine whether the *method* of measuring or determining a fact has achieved general acceptance in the scientific community. The test has not been extended to other types of evidence, such as expert testimony about child sexual abuse syndrome (*People* v *Beckley*, 434 Mich 691 (1990)). As the Michigan Supreme Court pointed out, "...[T]here is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral

sciences" (*Beckley*). By applying the test to all "scientific evidence" (i.e., all scientific opinion evidence), the language of the bill could be used to prevent the admission of considerably more than is excluded under Michigan's current common law *Davis-Frye* rule, according to the MTLA.

Opposing Argument

In view of existing statutory requirements and court rules, the bill's early-offer provisions are not necessary to encourage the early settlement of cases. Under Public Act 178 of 1986, every tort action in which it is claimed that damages exceed $10,000 must be mediated (MCL 600.4951), and the law contains specific time frames and procedural requirements for mediation. Under the court rule governing mediation, if a party rejects a mediation panel's evaluation and the action proceeds to trial, that party must be ordered to pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the evaluation was (MCR 2.403). In fact, in a recent case in which two trials were held, the Michigan Court of Appeals held that the losing party must pay mediation sanctions for both trials (*Severn* v *Sperry Corp.*, No. 151353, 7-28-95).

Also as soon as a suit is filed, and until 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of judgment; if the offer is rejected, costs may be payable to either party depending upon whether the verdict was more favorable to that party (MCR 2.405). In addition, if a court finds that a civil action or defense was frivolous, the court must assess costs and fees against the nonprevailing party and that party's attorney (MCR 2.625, MCL 600.2591).

Furthermore, court rules already limit attorneys' contingent fees in actions for personal injury or wrongful death (MCR 8.121). The bill's attempt to base contingent fees on the amount and timing of a settlement or judgment would amount to price-fixing for lawyers, and would intrude on the Michigan Supreme Court's exclusive authority to regulate the legal profession.

Opposing Argument

The bill should include a "statute of repose" that would bar lawsuits involving a death or injury that occurred 15 years after a product was sold to the first buyer. Claims for defective products now may be brought many, many years after a product was manufactured. It is difficult for a manufacturer to "cost in" tort liability over a period of 20, 30, or more years, and litigation exposure has become nearly impossible to calculate.

Response: A statute of repose would arbitrarily deny individuals the opportunity to recover for injuries that did not manifest themselves until many years after a product was sold. A 15-year rule would bar claims arising from such products as thalidomide, asbestos, and hazardous waste. While reducing manufacturers' liability, a statute of repose would shift to the taxpayers the cost of caring for the victims of defective products.

Legislative Analyst: S. Margules

FISCAL IMPACT

Provisions in the bill concerning the allocation of fault among multiple tort-feasors and absolute defense would have an indeterminate impact on State and local units of government. The amount depends on the number of lawsuits in which a unit of government is one of multiple defendants. Highway negligence cases account for the majority of tort payments by the State. Annual payments have averaged $15.7 million. The majority of cases against the Michigan Department of Transportation result from accidents in which more than one vehicle was involved.

The bill would have no fiscal impact on the courts.

Fiscal Analyst: B. Bowerman

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House
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Senate Bill 344 (Substitute H-6)
First Analysis (6-8-95)

Sponsor: Sen. Joel D. Gougeon
Senate Committee: Economic Development, International Trade, and Regulatory Affairs
House Committee: Commerce

THE APPARENT PROBLEM:

Critics of the tort (or liability lawsuit) system, particularly manufacturers and others in the business sector, characterize it as a hidden tax that stifles innovation, suppresses enterprise, restricts the availability of products and services, and reduces the ability of Michigan businesses to compete in the global economy. They allege that an ever-increasing number of claims and lawsuits, the everpresent prospect of large verdicts or awards, and ever-expanding theories of liability not only add to the cost of doing business and to the price of products but help to create an atmosphere of unpredictability that threatens the ability of businesses to plan and conduct their affairs. The problem is described as especially acute in the area of product liability.

(The term "tort" is typically defined as a civil -- as opposed to criminal -- wrong, and tort law comprises the legal rules that decide when accident victims must be compensated by those responsible for the harm done. Product liability cases, generally speaking, involve injuries to person and property allegedly resulting from the use of products; these include injuries allegedly caused by faulty design, faulty production, or inadequate warnings or instructions. Some product liability cases are brought by workers injured on the job by machinery or other products.)

Critics argue that its unpredictability gives the tort system the look of a lottery: people file claims against as many potential defendants as possible hoping to find one or more "deep pockets" and a sympathetic jury. This gives rise to what critics insist are frivolous suits, suits without real merit. Yet these suits can be costly to defend. Sometimes it is considered prudent to settle instead. What is worse, cases that appear frivolous to a defendant can be lost. This is said particularly to be the case when large, powerful institutions or relatively wealthy (or well-insured) businesses, regardless of size, are pitted against injured individuals; sympathetic juries will compensate the injured for the harm they have suffered without regard to the culpability of those who will be forced to pay. The unpredictability leads, as well, to higher insurance premiums. Smaller businesses are also at risk since they often cannot afford liability insurance or the cost of litigation.

The contingent fee, whereby lawyers are paid only out of awards, is considered a contributing factor, since there is no financial disincentive to keep a plaintiff from filing suit. (Some people also are offended at the large share of awards -- typically one-third after expenses -- that go to lawyers.) The doctrine of joint and several liability is also singled out as a culprit, because that requires a defendant with a small percentage of fault to pay all or a large portion of an award when other defendants cannot pay. Critics also claim that defendants are sometimes the victim of "junk science" -- theories of causation propagated by professional expert witnesses that are outside the scientific mainstream but convincing to juries of ordinary citizens. Further, it is alleged, products designed, manufactured or sold many years earlier can become subject to new standards; businesses that made or distributed products that met every standard available can still be judged to be at fault for injuries that occurred in the use of the products. (This can even be true, companies say, when the product has been misused or altered.) The uncertainty and fear that surround the arena of product liability inhibits the development and introduction of new products, critics say, including products with great utility in the prevention and treatment of illness and disease.

[Others dispute this characterization, however. Trial lawyers, consumer advocates, and others argue that manufacturers and other businesses are exaggerating the impact of lawsuits and seeking to escape responsibility for the harm done by the products they sell. See Arguments Against.]

If the tort system is to achieve its purposes of discouraging negligent behavior and compensating those injured by the negligence of others, say the critics, the unpredictability of the system needs to be reduced and personal responsibility needs to be the focus. Legislation has been introduced with the stated aim of addressing various elements of the tort system, particularly as they apply to product liability actions.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act (RJA) to do the following in regard to product liability actions:

-- Create a rebuttable presumption that a manufacturer or seller was not liable if the aspect of production that allegedly caused the injury complied with federal or state standards.

-- Provide that a manufacturer or seller of a drug would not be liable if the drug had been approved for safety and efficacy by the U.S. Food and Drug Administration and was in compliance with the approval when it left the manufacturer's or seller's control. (This would not apply to medical devices or appliances.)

-- Provide that a manufacturer or seller would not be liable in a case alleging a production defect unless the product was not reasonably safe when it left their control and there was a practical and technically feasible alternative production practice available that would have prevented the harm without affecting the usefulness or desirability of the product and without creating equal or greater risk of harm.

-- Allow the admission in evidence, for certain purposes only, of subsequent changes in theory, knowledge, technique, or procedure with regard to the production of a product.

-- Provide that a manufacturer or seller would not be liable if the harm was caused by alteration or misuse of a product that was not reasonably foreseeable; if the user was aware of, and voluntarily exposed himself or herself to the risk; or if the alleged harm was caused by an inherent characteristic of the product.

-- Specify that a manufacturer or seller would not be liable for failure to warn if the product was provided for use by a sophisticated user.

-- Provide that a seller other than a manufacturer would not be liable for harm allegedly caused by the product unless the seller failed to exercise reasonable care, including the breach of any implied warranty, or the seller made an express warranty and the product failed to conform to the warranty.

-- Specify that a defendant would not be liable for failure to warn of risks that should have been obvious to a reasonably prudent product user or that were a matter of common knowledge.

-- Limit damages for noneconomic loss except in instances of gross negligence to $280,000 or, in cases of death or permanent loss of a vital bodily function, $500,000, with those amounts to be adjusted annually based on inflation. (The limits would not apply in cases of gross negligence.)

-- Redefine "product liability action" to include injuries or deaths resulting from the sale of a product.

The bill would do the following in regard to all tort actions:

-- Eliminate joint liability except in medical malpractice actions, and delete provisions requiring a court to allocate an uncollectible amount among other parties to an action.

-- Require a court to include the fault of those who had entered into settlements and of those who were not parties to the action when determining the percentage of fault in a personal injury claim involving multiple tort-feasors.

-- Establish criteria for the testimony of expert witnesses.

-- Provide that a novel form of scientific evidence could be admitted only if it had achieved general scientific acceptance among experts in the field.

Senate Bill 4 (10-8-95)

-- Provide that it would be an absolute defense if the person who was injured or killed had an impaired ability to function due to the influence of intoxicating alcohol or a controlled substance and was 50 percent or more the cause of the accident or event; and require a reduction of damages if the percentage was under 50 percent.

In addition, the bill would limit malpractice actions against certified public accountants.
The bill would apply to actions filed upon the expiration of 90 days after the bill's effective date.

Product Liability Amendments

Production Practices/Governmental Standards. Currently, it is admissible as evidence that a product was produced pursuant to the federal and state law, rules, or regulations in effect at the time the product was sold or delivered by the defendant to the initial purchaser or user. The bill would delete this provision and replace it with the following.

In an action for harm allegedly caused by a production defect, the manufacturer or seller would not be liable unless the plaintiff established that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. An alternative production practice would be practical and feasible only if the technical, medical, and scientific knowledge relating to the production of the product were, at the time the specific unit of the product left the control of the manufacturer or seller, developed, available, and capable of use in the production of the product, and economically feasible for use by the manufacturer. Technical, medical, or scientific knowledge would not be economically feasible for use by the manufacturer if use of that knowledge in production of the product would significantly compromise the product's usefulness or desirability.

In a product liability action for harm allegedly caused by a product, there would be a rebuttable presumption that the manufacturer or seller was not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the production that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute, was in compliance with relevant regulations or standards promulgated by a federal or state agency responsible for reviewing the safety of the product, or had been approved by such an agency.

Noncompliance with a relevant standard in federal or state statute or with relevant regulations or standards promulgated by a federal or state agency, or lack of approval by a federal or state agency, would not raise a presumption of negligence on the part of a manufacturer or seller. Evidence of compliance or noncompliance with a regulation or standard not relevant to the event causing the death or injury would not be admissible.

Government Standards: Drugs. In a product liability action, a drug would not be defective or unreasonably dangerous, and the manufacturer or seller would not be liable, if the drug had been approved for safety and efficacy by the U.S. Food and Drug Administration and the drug and its labeling were in compliance with that organization's approval at the time the drug left the control of the manufacturer or seller. This would not apply if the defendant at any time before the event that allegedly caused the injury: a) intentionally withheld from or misrepresented to the F.D.A. information concerning the drug required to be submitted; or b) made an illegal payment to an official or employee of the administration for the purpose of securing or maintaining approval of the drug. This entire provision would not apply to a medical appliance or device. It also would not apply to a drug sold in the United States after the effective date of an order of the U.S. Food and Drug Administration to remove the drug from the market or withdraw its approval.

Evidence of Subsequent Changes. The bill provides that with regard to the production of a product that was the subject of a product liability action, evidence of a philosophy, theory, knowledge, technique, or procedure that was learned, placed in use, or discontinued after the event resulting in the death of or injury to the person or property, that if learned, placed in use, or discontinued before the event would have made the event less likely to occur, would be admissible only for the purpose of

proving the feasibility of precautions, if controverted, or impeachment.

Nonliability for Altered or Misused Product. Under the RJA, it is admissible in a product liability action that the cause of the death or injury was an alteration or modification of the product, or of its application or use, made by a person other than, and without specific directions from, the defendant. The bill would delete this provision, and specify instead that a manufacturer or seller would not be liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there had been an alteration of the product and whether an alteration was reasonably foreseeable would be legal issues to be resolved by the court. "Alteration" would mean a material change in a product after the product left the control of the manufacturer or seller and would include a change in the product's design, packaging, or labeling; a change to or removal of a safety feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product.

In addition, the bill specifies that a manufacturer or seller would not be liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable would be legal issues to be resolved by the court. "Misuse" would mean use of a product in a materially different manner than the product's intended use. Misuse would include uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

Assumption of Risk/Inherent Characteristic. A manufacturer or seller would not be liable in a product liability action if the purchaser or user was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk (and the risk he or she exposed himself or herself to was the proximate cause of the injury). This provision would not relieve a manufacturer or seller from a duty to use reasonable care in a product's production. In addition, a manufacturer or seller would not be liable if the alleged harm was caused by an inherent characteristic of the product that could not be eliminated without substantially compromising the product's usefulness or desirability and that was recognized by a person with the ordinary knowledge common to the community.

Seller's Defense. In a product liability action, a seller other than a manufacturer would not be liable for harm allegedly caused by the product unless one of the following applied: 1) the seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries; or 2) the seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Product Warnings. Currently, it is admissible as evidence that, before the death or injury, written warnings were provided that gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product that the defendant knew or should have known. The bill would add that a defendant would not be liable for failure to warn of material risks that were or should be obvious to a reasonably prudent product user or a material risk that was or should be a matter of common knowledge to persons in the same or similar position as the plaintiff.

In a product liability action brought against a manufacturer or seller for harm allegedly caused by a failure to provide adequate warnings or instructions, the manufacturer or seller would not be liable unless the plaintiff proved that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information that was reasonably available at the time the specific unit of the product left the control of the manufacturer.

The bill provides that the preceding provision would not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product had left the manufacturer's or seller's control.

Sophisticated User. Except to the extent a state or federal statute or regulation required a manufacturer to warn, a manufacturer or seller would not be liable in a product liability action for failure to provide an adequate warning if the product were provided for use by a sophisticated user. "Sophisticated user" would mean a person or entity that, by virtue of training, experience, a profession, or legal obligations, was or generally was expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who did not have actual knowledge of the product's potential hazard or adverse effect that caused the injury would not be a sophisticated user.

Caps on Noneconomic Damages. In a product liability action, damages for noneconomic loss could not be awarded in an amount that exceeded $280,000. If, however, the defect in the product caused either the person's death or permanent loss of a vital bodily function, the maximum award for noneconomic losses would be $500,000. On the bill's effective date, the state treasurer would have to adjust the limitations so that they would be equal to the medical malpractice caps. After that date, the state treasurer would adjust the caps each year to maintain that equality. In awarding damages in a product liability action, the trier of fact would have to itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party could inform the jury of the limitations on noneconomic damages. The court would have to adjust an award of noneconomic loss to conform to the statutory maximums.

The limitation on damages for noneconomic loss for death or permanent loss of a vital bodily function would not apply to a defendant if the trier of fact determined by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence. "Gross negligence" would mean conduct so reckless as to demonstrate a substantial lack of concern for whether injury resulted.

"Noneconomic loss" would mean any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages. "Economic loss" would mean objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

Calculation of Economic Loss. If damages for economic loss could not be readily ascertained by the trier of fact, then the calculation would be based on an amount that was equal to the state average median family income as reported in the immediately preceding federal decennial census and adjusted by the state treasurer (as with the caps on awards).

Venue. The bill provides that, for purposes of the RJA section governing venue in tort actions, in a product liability action, a defendant would be considered to conduct business in a county in which the defendant's product was sold at retail. The venue provisions would also be amended in other ways, as described later, for all kinds of actions.

Product Liability Action. Currently, the RJA defines "products liability action" as an action based on a legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product. The bill, instead, refers to death or injury caused by the "production" of a product or product component. The bill would define "production" as the activities described above, as well as "selling".

Compliance with Nongovernmental Standards. Under the RJA, it is admissible as evidence in a product liability action that the manufacture, construction, design, etc. was done pursuant to the generally recognized and prevailing nongovernmental standards in existence at the time the product was sold or delivered by the defendant to the initial purchaser or user. The bill provides, instead, that a court would have to admit as

evidence in a product liability action that production of the product was in accordance with the generally recognized and prevailing nongovernmental standards in existence at the time the specific unit of the product was sold or delivered by the defendant to the initial purchaser or user.

Knowing Manufacture/Distribution of a Defective Product. The provisions above dealing with product liability actions (except for the venue provision) would not apply in an action against a manufacturer if the manufacturer knowingly manufactured or distributed a defective product, or knowingly caused a defective product to be manufactured or distributed.

All Tort Actions

Joint and Several Liability/Allocation of Fault The bill would essentially eliminate joint and several liability except in medical malpractice cases. Under the bill, in an action for the death of or injury to an individual, regardless of the theory of liability, liability would be separate. Except for medical malpractice claims, a person would not be required to pay damages in an amount greater than his or her percentage of fault. The bill would delete the requirement that the court reallocate uncollectible amounts. The court would instruct the jury to make findings indicating the total amount of each plaintiff's damages (as now) and the percentage of the total fault of all persons who contributed to the death or injury, including each plaintiff and each person released from liability (under section 2925d), regardless of whether the person had been or could have been named as a party to the action. (The act currently requires the trier of fact to allocate the percentage of fault of "all of the parties regarding each claim as to each plaintiff, defendant, and third part defendant." Under the Michigan Court Rules, a third-party defendant is someone who is or may be liable to the defendant for all or part of the plaintiff's claim, and is served with a summons and complaint by a defending party. Under Section 2925d of the RJA, when a release or a covenant not to sue is given to someone liable in tort, it discharges that tort-feasor from liability for contribution to any other tort-feasor.)

The bill specifies that in an action based on tort or based on another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person would be allocated by the trier of fact and, subject to the provision cited above, in direct proportion to the person's percentage of fault. In assessing percentages of fault, the trier of fact would have to consider the fault of each person, regardless of whether the person had been, or could have been, named as a party to the action. Upon motion of a party within 91 days after identification of a nonparty, the court would grant leave to the moving party to file and serve an amended pleading alleging one or more causes of action against that nonparty. Such a cause of action would not be barred by a period of limitation at the time of the filing of the original action. The bill specifies that joint and several liability provisions in Sections 2956 through 2960 would not eliminate or diminish a defense or immunity that currently exists, except as expressly provided. Assessments of percentage of fault for nonparties would be used only to accurately determine the fault of named parties. If fault was assessed against a nonparty, a finding of fault would not subject the nonparty to liability in that action and could not be introduced as evidence of liability in another action.

For medical malpractice claims, the law would remain as it is now. Currently, where there is an at-fault plaintiff, a party does not have to pay damages in an amount greater than his or her percentage of fault, except when a share of an award is uncollectible. Then the uncollectible amounts are reallocated among the other parties, including an at-fault plaintiff, according to their respective percentages of fault. A party cannot be required to pay a percentage of an uncollectible amount exceeding his or her percentage of fault. (Government agencies, except for hospitals and medical care facilities, do not have to pay a percentage of an uncollectible amount that exceeds their percentage of fault even in cases where the plaintiff is without fault.) In cases where the plaintiff is without fault, the old rule of joint and several liability applies, whereby each defendant can be liable for the entire amount of an award, regardless of percentage of fault.

Expert Witnesses/Scientific Evidence. The bill specifies that in an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert would not be admissible unless the court determined that the opinion was reliable and would assist the trier of fact. In making that determination, the court would have to examine the opinion and the basis for it, including the facts,

technique, methodology, and reasoning relied on by the expert, and would have to consider all of the following:

-- Whether the opinion and its basis had been subjected to scientific testing and replication, and peer review publication.

-- The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis were consistent

damages would have to be reduced by that percentage. "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" would mean that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses were impaired to the point that his or her ability to react was diminished from what it would have been had the individual not consumed liquor or a controlled substance. An individual would be presumed to have an impaired ability to function due to the influence of intoxicating liquor or a controlled

Section 1641 of the act provides that when causes of action are joined, the venue could be laid in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change. The bill would further specify that if more than one cause of action is pleaded in the initial complaint or added by amendment at any time during the action and one of the actions is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue would be determined subject to Section 1629.

Certified Public Accountants In an action for professional malpractice against a certified public accountant (CPA), the CPA would be liable for civil damages resulting from an act, omission, decision, or other conduct in connection with public accounting services performed by him or her only if 1) the act, etc. constituted fraud or an intentional misrepresentation or 2) the CPA was aware that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. If the CPA identified in writing to the client each person who was intended by the CPA to rely on the services, the CPA could be held liable only to each identified person, in addition to each person who was a party to a contract with the CPA. Each report issued by a CPA would have to be accompanied by a written notice indicating persons or generic groups or class descriptions of persons intended by the CPA to rely on these services.

MCL 600.919 et al.

HOUSE COMMITTEE ACTION:

The House Commerce Committee reported a substitute bill that made a number of changes to the Senate-passed version. On the issue of government standards, the substitute provides a rebuttable presumption that a manufacturer or seller is not liable when standards are met rather than simply saying, as the Senate-passed version did, that the manufacturer or seller is not liable in such cases. The substitute does contain the absolute defense language for a manufacturer or seller of drugs that are FDA-approved. The provisions in the Senate-passed bill on contingent fees were removed. The substitute contains additional provisions on joint and several liability consistent with those found in House Bill 4508. On the issue of venue, the substitute also added a provision found in House Bill 4508 dealing with multiple causes of action. The committee substitute exempted employees from the "sophisticated user" provision in cases where an employee does not have "actual knowledge" of the potential hazard or adverse effect. On the subject of caps on non-economic damages, the committee substitute says the caps do not apply if the jury determines by "a preponderance of the evidence" that the death or loss was the result of the defendant's gross negligence. The Senate-passed version required "clear and convincing" evidence of gross negligence, a much higher standard for the plaintiff to meet. The substitute also contains language to keep the caps equal to the caps for medical malpractice cases. The committee substitute also removed a provision that, according to committee staff, would have changed the common law rule that says an employer is liable for torts of his or her employee. The provisions on certified public accountants was also re-written in the House committee substitute to eliminate some notification requirements.

FISCAL IMPLICATIONS:

The Senate Fiscal Agency said of the Senate-passed bill that its provisions concerning the allocation of fault among multiple tort-feasors and concerning absolute defenses would have an indeterminate impact on state and local units of government. The amount depends on the number of lawsuits in which a unit of government is one of multiple defendants. Highway negligence cases account for the majority of tort payments by the state. Annual payments have averaged $15.7 million. The majority of cases against the Michigan Department of Transportation result from accidents in which more than one vehicle was involved. The bill would have no fiscal impact on the courts. (Analysis dated 5-23-95)

ARGUMENTS:

For:

The bill's aim is to bring some common sense, reasonableness, and predictability to the liability system, especially to product liability. Its goal is to make the system less of a lottery and reduce the number of frivolous suits. The proposed legislation intends to restore the system to its original purposes, by protecting and compensating legitimate claimants and eliminating the illegitimate claims. The emphasis of our civil justice system should be on personal responsibility, and not on redistributing wealth or on compensating victims

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regardless of fault. The current system poses an unjust economic and psychological burden on business, including small businesses, which must use far too many of their resources dealing with lawsuits or the threat of lawsuits.

One commonly cited example is that of a West Michigan ladder manufacturer who has never lost a case and yet commits eight percent of the company's sales and ten percent of its owner's work time on the issue of product liability. A representative of a Michigan manufacturer of motorized wheelchairs testified that the company has spent $1 million over the past five years on insurance, attorneys, investigative services, and settlements stemming from 54 claims by customers of alleged injury. Of these, 19 became lawsuits. The company estimates $45 per wheelchair goes to product liability defense. Yet, the company representative said, there have been only two legitimate claims in 26 years. The bill provides in statute more guidance for defendants by clearly defining the defenses they are entitled to in court rather than making them subject to the shifting standards of the common law as determined by the courts. The current system stifles innovation, discourages entrepreneurship, reduces job availability, and leads to higher prices. It does not consistently lead to safer products.

Among the benefits of the bill are the following.

** Defendants will pay their fair share of damage awards but no more because the bill will eliminate joint and several liability and allow the fault of those who are not party to the case to be taken into account. No longer will a deep pockets defendant with a small percentage of fault have to pick up the entire tab because other defendants are insolvent or uncollectible or immune from suit. The current situation is clearly unfair and it encourages lawsuits, encourages the search for deep pockets defendants who can be made to pay for the negligence of others. This is one of the reasons why there is so much litigation, why so many people and businesses are drawn into lawsuits, and why lawsuits exact such a toll on our economy and society.

** Allowing the apportionment of fault to "nonparties", those not involved in the lawsuit, is also a means of providing fair treatment for defendants. Currently, the fault of a nonparty (who may be immune from suit or without assets or beyond the reach of the court) is not taken into account as a means of reducing the liability of an at-fault defendant. This will also help to create a system where defendants only have to pay their fair share and do not have to pay for the share of the harm caused by others.

** It further strengthens provisions aimed at preventing "forum shopping." Cases will be heard where the injury occurred, not where the juries are more sympathetic or generous. A representative of General Motors has testified of the growing number of cases it faces in Wayne County courts even though the injuries at issue occurred elsewhere, even out of state.

** Non-economic damages will be capped in product liability cases. This will help to control the size of "pain and suffering" awards, which are those above and beyond compensation for the actual economic harm caused to an injured person. The limits in the bill are those already in law for medical malpractice cases. This will lessen the unpredictability of awards and help control insurance costs.

** The bill attacks "junk science" by establishing additional criteria for a judge to use in determining whether a scientific opinion could be presented to a jury, including the opinion's acceptability in the relevant expert community and whether the opinion would be relied on in the real world outside of the courtroom. The standards for testimony today are too loose. Too many bogus opinions are allowed. There is an industry of expert witnesses ready to declare a product dangerous. The bill will send a message to the courts that some kinds of testimony can be excluded. Defense lawyers say this is not the philosophy of the courts now.

** It provides additional protection for companies that meet the relevant government standards for their products or production processes. The bill says if a company has made the effort to meet the standards that exist for its products there ought to be a rebuttable presumption that they are not liable. The presumption can be overcome if the evidence justifies that. The bill says, moreover, that drug companies whose products receive FDA approval for safety or effectiveness are not liable unless the company deceived the government in the approval process. Drug companies spend large sums of money and expend enormous energy getting approval for their products. Many valuable products never reach the market or are withdrawn

because of successful lawsuits (or the threat of future lawsuits) even though there is no medical evidence that they are harmful.

** The bill aims to restore personal responsibility. People need to take responsibility for their own decisions and their own mistakes. The bill says companies cannot be sued when those buying or using a product are aware of the product's dangers and when the dangerous aspect of a product is an inherent characteristic. People know they need to be careful using knives and scissors, lawn mowers and hedge trimmers, ladders and trampolines. It says companies are not responsible for injuries when people misuse their products or alter them in dangerous ways or fail to maintain them properly. And the bill intends that companies not be sued for failing to warn people of dangers that the companies could not have reasonably foreseen or that are obvious. Nor could they be held liable for failure to warn when there was a sophisticated user involved.

** The bill prevents people who are impaired due to alcohol or drug use from collecting damages if they were 50 percent or more at fault themselves and would reduce their awards if their own share of fault was less than that. Why should drunk drivers who themselves are major contributors to their own injuries be allowed to sue others? Cases of that kind are not only unjust but lead to a lessening of confidence in the legal system.

Against:

There simply is little or no evidence that there is a liability lawsuit or a product liability crisis in Michigan. It is irrelevant to cite shocking cases from elsewhere around the country or to describe cases being heard in federal courts. Michigan, trial lawyers say, is a conservative state on the issue of product liability. It is not a strict liability state; cases must be based on negligence. Companies are allowed a wide variety of defenses in court. And, reportedly, defendants win two-thirds of the cases. Michigan law does not permit punitive damages, which is what are typically involved in the multi-million dollar cases elsewhere that are reported on in the newspapers. (It should be noted, by the way, that the reason such cases are the subject of news stories and so shocking is that they are relatively rare occurrences anywhere.) It does provide for the payment of non-economic damages, awards to compensate people for the diminution of the quality of life caused by the negligence of others. But this is compensation to victims, not a punishment for companies for their conduct. Typically, tort cases represent a small portion of all civil suits and product liability suits an even smaller proportion. Only about four or five cases per thousand are product liability cases, say trial lawyers. They are not clogging the court system. Indeed, passage of this sweeping new legislation could lead to increased litigation as the appellate courts are asked to interpret it.

The bill would severely restrict (and some critics say all but abolish) the product liability lawsuit and, with it, the ability of individuals to collect damages when they have been severely injured by dangerous and defective products. It provides rigid, inflexible rules that will allow manufacturers and others to escape responsibility for the most severe, life-altering injuries. It will keep important information out of the hands of juries. Information that now can be used as a defense would become instead a source of near or complete immunity. Trial lawyers say that product liability defendants can already use compliance with government standards and industry standards, the alteration and misuse of a product, the existence of a sophisticated user, the knowledge or assumption of risk, and many other defenses in Michigan courts. Juries evaluate these defenses now. The proposed legislation would elevate such defenses and make them an enormous barrier to plaintiffs seeking compensation. The law has developed over many years on these issues (many are subject to court rules), and this bill would in every case increase the burden of proof on injured plaintiffs. This will lessen the incentive to produce and sell safe products and to recall or redesign unsafe products. It will damage our civil justice system.

Among specific criticisms of the bill are the following.

** The elimination of joint and several liability will punish injured victims of negligence. A common complaint about the concept of joint and several liability is that it forces defendants with the financial means to pick up the portion of a damage award that would otherwise be uncollectible. But the alternative is to make the injured party bear these costs. The choice is between making a negligent party bear the cost of uncollectible judgments or making the innocent injured party bear the cost. This bill says: make the injured party pay. Is this fair? Further, the use of the "empty chair"

approach, whereby a percentage of the fault can be attributed to those who are not parties to the lawsuit will have the effect of further reducing awards to plaintiffs. Manufacturers being sued by employees over injuries caused by defective machinery will be allowed to pin blame on the employer, who would be immune from suit (since worker's compensation law rules out making the employer a defendant). The "empty chair" provision is likely to involve more people in lawsuits, since plaintiffs will make every effort to bring all those who may be assigned a percentage of the fault into the case.

** The caps on non-economic damages will also punish victims, particularly those who are very young, those without much income history or without future economic means to lose, and those who are catastrophically injured, such as those horribly disfigured or paralyzed. No justification has been provided for these limits on damages, no evidence has been provided of outrageous awards in Michigan or unjustified awards. Furthermore, caps make it possible for companies to calculate that it is cheaper to pay claims on a product that injures people than to redesign it to make it safer. Moreover, the bill says a jury is not to be told of the limits. After a jury has awarded an amount more than the cap, the award is adjusted downward by the court. This is dishonest. Evidence from other states suggest that these caps will have no effect on liability insurance rates, say critics of the bill.

** Government standards are treated by the bill as the be-all and end-all of product safety. But these standards are often minimum standards. They are the product of lobbying by industry and of compromise. They can become outdated and irrelevant. Compliance with such standards is already admissible as evidence for a jury to consider when evaluating all the circumstances surrounding an incident. This bill says compliance with such standards, no matter how outdated or inadequate, creates a rebuttable presumption that a manufacturer is not liable and in the case of drugs, compliance with federal standards would be an absolute defense. The result will be that people injured by unreasonably dangerous products will not be able to collect damages for their injuries because the product met a government standard.

** In several places dealing with product liability cases, the bill says "a manufacturer or seller is not liable" if a particular circumstance is established -- for example, if a product is altered or is misused (unless the alteration or misuse was reasonably foreseeable). It does not simply allow such alteration or misuse to be taken into account in an overall evaluation of the event in question. (That is the case now.) It provides immunity. This is extreme. Further, in the two cases cited, it makes the questions of whether there was an alteration or misuse, and whether the alteration or misuse was foreseeable, issues for a judge to decide. The question cannot even be put before a jury. This is contrary to our legal tradition and denies injured people the right to a jury trial. The definitions of the terms "alteration" and "misuse" are very broad. An alteration, for example, can include "deterioration" because of improper maintenance or storage. Similarly, a company is given immunity for failing to warn about the dangers of a product if the product was intended for use by a "sophisticated user." What about cases where a manufacturer knows of a dangerous feature of a product that even the most sophisticated user cannot be expected to know about?

** A sizeable percentage of the product liability lawsuits in the state involve workplace injuries, say labor representatives, so the bill will particularly affect workers injured in the workplace by unsafe machines, tools, and chemicals. For example, the "empty chair" provision will allow the apportionment of blame to employers, even though they are immune from suit. And, labor representatives say, employers and their insurance carriers would be reimbursed for their worker's compensation costs out of any financial award to injured workers. This could dramatically reduce damage awards to injured workers. The "sophisticated user" defense could also take away workers' legal rights and injured workers' ability to receive damages for injuries, because the definition is so broad. Trained workers could not sue based on the manufacturer's failure to warn of hazards. The government standards provisions would also put workers at a disadvantage: workers could be injured on machinery that met government standards when it was produced, but was considered dangerous under new standards that an employer had ignored. The bill is simply unfair to workers.

** Some of the provisions of the bill represent over-reaching by the legislature. The state constitution says that "the supreme court shall by general rules establish, modify, amend and simplify

the practice and procedure in all courts of this state." And court decisions have said that when there is a conflict between a statute and court rule, the rule prevails for issues of practice or procedure. Some people believe some provisions of the bill dealing with evidence and procedure may violate the constitution. For example, the bill contains restrictions on expert opinions and various rules of evidence, which are the subject of court rules.

POSITIONS:

Michigan Voters Against Lawsuit Abuse supports the bill. (6-7-95) (That organization includes the Michigan Manufacturers Association, the Michigan State Chamber of Commerce, the National Federation of Independent Business, the Small Business Association of Michigan, the Michigan Retailers Association, the Greater Detroit Chamber of Commerce, and the Grand Rapids Chamber of Commerce.)

The Michigan Municipal League supports the provisions on joint and several liability. (6-7-95)

The Michigan Townships Association supports the elimination of joint and several liability. (6-7-95)

The Michigan Trial Lawyers Association is opposed to the bill. (6-7-95)

The Michigan Consumer Federation is opposed to the bill. (6-7-95)

The Michigan State AFL-CIO is opposed to the bill. (6-7-95)

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